

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

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MOUSSA OUSMANE, ANTONIA DELGADO and  
MOHAMMED ALI

Index No. \_\_\_\_\_

Individually, and on behalf of all others similarly situated  
as class representatives

Plaintiffs,

**COMPLAINT**

-against-

CITY OF NEW YORK, CHRISTOPHER WARD,  
Commissioner of the Department of Environmental  
Protection and Chairperson of Environmental Control  
Board, GRETCHEN DYKSTRA, Commissioner of the  
Department of Consumer Affairs, and THOMAS R.  
FRIEDEN, Commissioner of the Department of Health &  
Mental Hygiene

Defendants.

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Plaintiffs, by their attorneys, the Urban Justice Center, individually, and on behalf of all  
other New York City street vendors similarly situated respectfully allege as follows:

**NATURE OF THE ACTION**

1. This case is about the decision of the City of New York (the “City”) to  
dramatically increase penalties paid by street vendors for violations of the New York City  
vending laws and regulations, and its complete failure to provide any notice or opportunity for  
public comment in doing so. These actions by the City were in clear violation of the  
requirements of the New York City Charter, and they have irreparably harmed the Plaintiff class  
of more than twelve thousand struggling, small businesspeople.

2. Plaintiffs are licensed, tax-paying entrepreneurs who sell food and merchandise  
on the streets and sidewalks of the New York City. Plaintiffs, who are already subject to a

complex and arcane set of vending regulations, are now also required to pay increased fines – up to \$1,000.00 -- for even the most minor, technical violations of the City’s vending regulations. Plaintiffs, who are primarily first generation immigrants with few job skills, often earn less than minimum wage to support themselves and their families. Unable to pay these increased penalties, Plaintiffs are threatened with irreparable harm, including the loss of their vending licenses and closure of their businesses; indeed, some have already been put out of work due to the City’s illegal actions.

3. Despite numerous written and verbal requests by Plaintiffs and their counsel over the last year, the City has failed to provide any evidence that the increased penalty schedule adopted by the Environmental Control Board during the summer of 2003 (“the Increased Penalty Schedule”) was promulgated in compliance with the requirements of the New York City Administrative Procedure Act (“CAPA”) of the New York City Charter. Plaintiff’s own investigation has shown that the requirements of CAPA were ignored.

4. Accordingly, Plaintiffs bring this class action seeking a judgment declaring the Defendants’ actions in promulgating the Increased Penalty Schedule to be null and void; preliminarily and permanently enjoining the enforcement of it; and awarding Plaintiffs compensatory damages for their injuries.

### **PARTIES**

5. Plaintiff MOUSSA OUSMANE, a forty-four year old resident of Brooklyn, is a licensed merchandise vendor who sells watches in downtown Manhattan. Vending is his sole source of income, from which he supports his wife and five children. On December 30, 2003, Mr. Ousmane was found in violation, after a hearing at the Environmental Control Board

(“ECB”), of vending less than twenty feet from a building entrance.<sup>1</sup> He was ordered to pay \$1,000.00, which he cannot afford. As a result, Mr. Ousmane risks having the electricity in his apartment turned off and losing his vending license when it expires next month.

6. Plaintiff ANTONIA DELGADO, a sixty-nine year old resident of Queens, has sold hats and shirts in downtown Manhattan for the last fifteen years. On December 29, 2003, Mrs. Delgado was found guilty, after a hearing at the ECB, of vending on a sidewalk that was less than twelve feet wide.<sup>2</sup> She was ordered to pay \$1,000.00. Due to the fine, Ms. Delgado has been forced to close her vending business because she can no longer afford pay the rent to store her merchandise in her garage.

7. Plaintiff MOHAMMED ALI, a forty-one year old resident of the Bronx, has supported his wife and four children by selling hot dogs and pretzels in downtown Manhattan for the past seven years. On March 10, 2004, he was accused of failing to conspicuously display his license while vending.<sup>3</sup> He was found guilty after a hearing and fined \$1,000.00. Unable to pay this fine, he is in jeopardy of being evicted from the garage where he stores his pushcart at night and defaulting on his small business loan.

8. The named Plaintiffs are representative of a class which includes all street vendors in New York City, similarly situated, who are subject to regulation under Chapters 17 and 20 of the NYC Administrative Code, and the rules and regulations thereunder relating to food vendors and merchandise vendors, respectively, and Articles 81, 89 and 113 of the New York City Health Code, relating to food vendors.

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<sup>1</sup> NYC Admin. Code §20-465(d) states that “no vending pushcart, stand or goods shall be located ...within twenty feet from any entranceway to any building...”

<sup>2</sup> NYC Admin. Code §20-465(a) states that no vendor “shall engage in any vending business on any sidewalk unless such sidewalk has at least a twelve-foot wide clear pedestrian path...”

<sup>3</sup> NYC Admin. Code §17-311(b) states that each “food vendor’s license shall be worn conspicuously by him or her at all times while he or she is operating as a food vendor.”

9. Defendant CITY OF NEW YORK is an incorporated municipality in the State of New York.

10. Defendant CHRISTOPHER WARD is the Commissioner of the Department of Environmental Protection (“DEP”), an agency of the City, organized and existing under Chapter 57 of the New York City Charter. Defendant CHRISTOPHER WARD is also the Chairperson of the ECB, an agency created pursuant to Chapter 57 of the NYC Charter, which is responsible for enforcing all laws and rules relating to “the regulation of street peddling.” NYC Charter §1404(c)(1)(e).

11. Defendant GRETCHEN DYKSTRA is the Commissioner of the Department of Consumer Affairs (“DCA”), an agency of the City organized and existing under Chapter 64 of the NYC Charter. The DCA is responsible for regulating merchandise (i.e. “general”) vendors.

12. Defendant THOMAS R. FRIEDEN is the Commissioner of the Department of Health & Mental Hygiene (“DHMH”), an agency of the City organized and existing under Chapter 22 of the NYC Charter. The DHMH is responsible for regulating mobile food vendors.

### **VENUE**

13. Venue is proper in New York County pursuant to CPLR § 504 because the cause of action arose there.

### **CLASS ACTION ALLEGATIONS**

14. Pursuant to New York Civil Practice Law and Rules (“CPLR”) §901, Plaintiffs bring this action on behalf of themselves and all other similarly situated New York City street vendors, alleging that Defendants have acted on grounds generally applicable to the asserted class, thereby making final injunctive and declaratory relief appropriate with respect to the class as a whole.

15. This action meets all the requirements of CPLR §901 in that:
- a) the class is so numerous that joinder of all members is impracticable: there are more than twelve thousand licensed street vendors in the New York City;
  - b) there are questions of law or fact common to the class, namely the validity of the City's actions in promulgating the Increased Penalty Schedule affecting violation penalties for all members of the class, which predominate over any questions affecting individuals;
  - c) the claims of the representative parties are, in as much as they represent individuals who are threatened with irreparable harm by the Increased Penalty Schedule, typical of the claims of the class;
  - d) the representative parties will fairly and adequately protect the interests of the class. They are represented by the Urban Justice Center ("UJC"), a non-profit organization with extensive experience representing marginalized communities, including street vendors, in complex litigation against the City;
  - e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy because the size of each individual claim is relatively small, and Plaintiffs lack the financial resources to bring suit individually.

### **BACKGROUND**

16. On or about August 11, 2003, Sean Basinski, Director of the UJC Street Vendor Project, was informed by an administrative law judge ("ALJ"), during an ECB hearing, that

violation penalties for street vendors had increased. Mr. Basinski requested a written notice describing the penalty increase, and was instructed to make a request for this information pursuant to the New York Freedom of Information Law (“FOIL”).

17. Over the following year, Mr. Basinski sent repeated FOIL requests to the ECB, DCA, and DHMH, to obtain information about the Increased Penalty Schedule and whether it was promulgated in compliance with CAPA. Among other information, Mr. Basinski specifically requested all documents in the ECB’s possession “relating to fines paid by street vendors for ECB-adjudicated violations,” and also all documents from any meetings at which decisions were made to increase vending fines, including notices of such decisions sent to the *City Record*.

18. In response to his FOIL requests, the ECB sent Mr. Basinski an internal memo describing “significant changes” to the penalty schedule for street vendors for violations of the NYC Administrative and Health Codes, as well as minutes from two 2003 meetings during which the ECB approved such fines increases. Despite repeated requests, the City has provided no documents or other evidence demonstrating that it promulgated the Increased Penalty Schedule in compliance with CAPA.

19. On May 12, 2004, during a telephone call with Jim Macron, Counsel for the ECB, Mr. Basinski requested information verifying whether the ECB’s decision to increase vendor penalties complied with the due process requirements of CAPA. Mr. Macron told Mr. Basinski that the ECB had already sent him all relevant documents in its possession.

20. On June 25, 2004, Mr. Basinski sent the ECB a letter stating he believed the ECB’s actions in promulgating the Increased Penalty Schedule were in violation of CAPA, requesting a meeting, and threatening this lawsuit if he received no response. Mr. Basinski received no response.

21. Plaintiffs have conducted their own search of the *City Record* for any notice of the Increased Penalty Schedule, or any public hearing relating thereto, and have found none.

**FIRST CAUSE OF ACTION**  
(CAPA)

22. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 21 hereof.

23. CAPA requires that any city agency shall:

- a) prior to adopting any rule, publish the full text of the proposed rule in the *City Record*, at least thirty days prior to the date set for a public hearing, along with a draft statement of basis and purpose of the proposed rule, the statutory authority, the time and place of the public hearing, or reasons that a public hearing will not be held, and the final date for receipt of written comments;
- b) submit copies of the notice to the City Council, the chairs of all community boards, the news media and civic organizations;
- c) after adopting any rule, and thirty days before it becomes effective, publish the full text of the rule in the *City Record*, along with a final statement of basis and purpose.

24. The DEP, ECB, DCA and DHMH are “agencies” as defined by CAPA.

25. The Increased Penalty Schedule is a “rule” as defined by CAPA.

26. Defendants illegally promulgated, and continue to illegally enforce, the Increased Penalty Schedule against Plaintiffs in violation of CAPA. Defendants failed to publish a notice of the proposed rule thirty days prior in the *City Record*; failed to announce the purpose of the proposed rule; failed to solicit written comments; failed to hold a public hearing; failed to

provide notice to the City Council, the news media, and the Community Boards; and failed to again publish notice in the *City Record* thirty days prior to the rule becoming effective.

27. Defendants' failure to comply with CAPA renders the Increased Penalty Schedule null and void as a matter of law.

**SECOND CAUSE OF ACTION**  
(PRELIMINARY INJUNCTION)

28. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 27 hereof.

29. As a direct result of the Increased Penalty Schedule, Plaintiffs have and will continue to suffer irreparable harm.

30. Plaintiffs have no adequate remedy at law.

**THIRD CAUSE OF ACTION**  
(ARBITRARY and CAPRICIOUS)

31. Plaintiffs repeat and reallege each an every allegation contained in Paragraphs 1 through 30 hereof.

32. Defendants promulgated the Increased Penalty Schedule in a manner, which was arbitrary and capricious, and therefore null and void as a matter of law.

**FOURTH CAUSE OF ACTION**  
(*ULTRA VIRES*)

33. Plaintiffs repeat and reallege each an every allegation contained in Paragraphs 1 through 32 hereof.

34. Pursuant to Chapter 57, §1404(c) of the NYC Charter, the ECB has the authority to enforce the provisions of the NJYC Charter and Administrative Code, and any rules and regulations made thereunder, regarding "the regulation of street peddling." The ECB has no



authority under the NYC Charter to create new regulations relating to street vendors, nor to amend existing ones.

35. The ECB's decision to promulgate the Increased Penalty Schedule was *ultra vires*, exceeding the scope of its statutory authority under the NYC Charter, and is therefore null and void as a matter of law.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray that the Court:

- a) Certify this action as a class action pursuant to CPLR §901;
- b) Enter declaratory and injunctive relief necessary and appropriate to remedy Defendants' violations of law;
- c) Award Plaintiffs damages in an amount to be determined at trial;
- d) Award Plaintiffs the reasonable attorney fees and expenses incurred by them in this proceeding;
- e) Grant Plaintiffs such other and further relief as the Court may deem just and proper, together with the costs and disbursements of this proceeding.

Dated: New York, New York  
August 13, 2004

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