STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CONNECTICUT VALLEY TOBACCONIST, LLC,

Plaintiff/Petitioner,

-against- Index No. 5161/07

PATRICK HOOKER, as Commissioner of the New York State Department of Agriculture and Markets, and DANIEL O'HARA, as Director of the New York State Fair,

Defendants/Respondents.

For a Judgment Pursuant to CPLR Article 78

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S/PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION

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FACTUAL BACKGROUND

This hybrid action/special proceeding challenges a ban against the sale and promotion of tobacco products at the 2007 New York State Fair, and on the State Fairgrounds generally, imposed by the New York State Department of Agriculture and Markets, Division of the State Fair. Because Petitioner has a likelihood of success on the merits and because it would suffer irreparable harm in the absence of an in injunction, this motion for preliminary injunctive relief should be granted.

The 2007 State Fair is scheduled to occur from August 23-September 3, on the 375 acre state fairgrounds in Syracuse. For the past ten years, Petitioner Connecticut Valley Tobacconist has sold cigars and other tobacco products, and promoted the general use and enjoyment of tobacco products at the New York State Fair, pursuant to a vendor's license granted to it by the Department of Agriculture and Markets, Division of the State Fair. This year, Respondents denied Petitioner's application for a vendor's license. The stated ground for denial was that Respondents are attempting to "encourage and promote a healthy New York." Petitioner's products are sold in sealed boxes. In no way does that present a public health menace requiring state action.

Despite Respondents' stated desire to promote a healthy State, apparently beginning with the Fair, their inactions regarding other products belie these words. First of all, Respondents have taken no action to actually restrict smoking at the Fair. People who attend the Fair remain free to smoke tobacco products they bring on to the Fairgrounds themselves. Thus, the environment will not be "smoke-free." Additionally and ironically, while banning the sale of tobacco on the Fairgrounds, Respondents continue to allow the sale of firearms on the State

Fairgrounds. In fact, a gun show is scheduled to be held on the Fairgrounds in September. The sale of firearms on the Fairgrounds demonstrates the hypocrisy involved in Respondent's attempt to impose a safe and healthy environment at the Fair by banning the sale of tobacco.

Additionally, at the State Fair Respondents are allowing the sale of numerous dangerous and unhealthy food and beverage items with little or no nutritional value. These items include (1) alcoholic beverages, which are directly linked to liver disease, among other things; (2) obesity-inducing soda, made up almost solely of corn syrup and processed sugar, which is linked to diabetes and heart disease; foods containing saturated fats and trans-fats – recently banned by the City of New York because of adverse health consequences – which is linked directly to heart disease, among other things. Despite the known adverse health consequences of these items, Respondents have taken the extraordinary step of singling out tobacco products for banning at the State Fair and on the Fairgrounds generally. Respondent's actions reveal a discriminatory intent against the sellers of tobacco products, which restricts the rights of willing and informed citizens to purchase tobacco products in a face-to-face transaction. For the following reasons, Petitioner is likely to prevail in its argument that Respondents' actions must be annulled as exceeding their authority and violating Petitioner's legal rights.

ARGUMENT

POINT I

RESPONDENTS' BAN ON THE SALE OF TOBACCO ON THE STATE FAIRGROUNDS EXCEEDS THEIR AUTHORITY

The issuance of licenses to sell products at the State Fair is governed by 1 NYCRR § 369.2, which states:

> Licenses shall be issued in the order in which applications are received and on a nondiscriminatory basis, <u>without regard to the content of the message the applicant wishes to convey</u>, except in the case where such message is clearly against public policy, shocks the collective conscience of the general public, or is directly contrary to the health, safety, or welfare of members of the general public. However, at no time shall one type of exhibition become so dominant over the whole so as to prevent the Division of the State Fair from offering a varied and effective group of exhibitions (emphasis added).

This regulation is clear that vendor's licenses shall generally be given "without regard to the content of the message the applicant wishes to convey." Respondents are directly violating their own regulatory command. Based on Respondents' own words, their goal in preventing the sale of tobacco on the Fairgrounds is to "promote" the view that banning the sale of tobacco is part of creating a healthy society. Thus, in denying Petitioner a license to sell at the Fair, Respondents have impermissibly taken into account their own subjective and discriminatory social preferences pertaining to the proper role of tobacco products in society. <u>See</u> <u>Boreali v. Axelrod</u>, 71 NY2d 1 (1987). Boreali is directly on point.

In <u>Boreali</u>, The Court of Appeals nullified administrative action which sought to regulate smoking in public areas. The Court held that the agency's use of subjective social preferences concerning the use of tobacco was impermissible, and infringed on the Legislative prerogative to set the public policy of the State. Similarly, in this case, Respondents are seeking to outlaw a legal product. It cannot be disputed that the sale of tobacco products to adults is a legal activity in the State of New York and in the United States. No law exists to the contrary, and Respondents simply have no legislatively sanctioned authority to restrict access to tobacco

products at the State Fair by consenting and informed adults, through their administrative power to issue licenses to sell goods at the Fair. As such, Respondents actions must be annulled.

No public policy exists banning the sale of tobacco to adults. As the Court of Appeals has repeatedly stated, "the public policy of this state when the legislature acts is what the legislature says that it shall be." See Messersmith v. American Fid. Co., 232 NY 161, 163 (1921)(Opn. by Cardozo, J.). In this case, the Legislature has expressly chosen to permit the sale of tobacco to adults in the State of New York, and to ban the sale of tobacco products to only people under the age of 18. See Pub. Health Law § 1399-cc. The law is clear that an administrative agency may not exceed the powers delegated to it by the Legislature and "declare through administrative fiat that which was never contemplated or delegated by the legislature." See Campagna v Shaffer, 73 NY2d 237, 242 (1989).

Additionally, the State of New York accepts funds from the Federal government premised on limiting tobacco only to children. See 42 U.S.C. § 300x-26. Implicit in the targeting of these funds toward children and in the State's acceptance and use of these funds is the public policy that adults remain capable and free to make their own choices regarding the purchase of tobacco.

Accordingly, Respondents have no authority, on public policy grounds or on any other ground, to ban the sale of tobacco at the State Fair to consenting adults presenting proper identification verifying their age. Respondents' attempt to impose their own social preferences on the public at large is precisely the type of administrative policy making struck down by the Court of Appeals in Boreali as exceeding the proper bounds of administrative power.

POINT II

RESPONDENTS' BAN ON THE SALE OF TOBACCO ON THE STATE FAIRGROUNDS IS ARBITRARY AND CAPRICIOUS

Respondents have singled out and banned tobacco products on the Fairgrounds, supposedly in the name of promoting a "healthy" State. Nevertheless, Respondents actions in no way further this stated purpose. As such, Respondents' actions must be annulled as arbitrary and capricious.

The Court of Appeals defines arbitrary and capricious as "action taken without sound basis in reason and without regard to the facts." Pell v. Bd. of Educ. of Union Free School Dist., 34 NY2d 222, 231 (1974). In this case, the facts in no way support Respondent's determination. First of all, if as stated, Respondents' goal is to promote a "healthy" environment, banning the sale of tobacco in no way furthers that purpose. Petitioner's products are sold in sealed containers. It is difficult to fathom how attendees at the Fair walking around with sealed cigar boxes contributes to an "unhealthy" environment. Additionally, and perhaps more importantly, even if attendees were to smoke their cigars after purchasing them from Petitioner, that activity would be entirely permissible, as Respondents have taken no action to attempt to ban smoking at the Fair.

Essentially, Respondents would have this Court believe that the act of selling cigars to adults in sealed boxes contributes to an "unhealthy" environment, while the very act of smoking does not. Such reasoning simply defies all logic and common sense and must be annulled.

Respondents' ban on tobacco sales as promoting a "healthy" environment is also wholly irrational because Respondents continue to allow other unquestionably dangerous and unhealthy products to be sold at the Fair and on the Fairgrounds. Notably, the sale of firearms on the Fairgrounds is permitted and, in fact, promoted by Respondents.

Additionally, Respondents permit the sale of numerous unhealthy food and beverage items at the Fair. For example, the sale of alcoholic beverages continues to be sold on the Fairgrounds. Other items, such as soda or cotton candy, for example, contain no known nutritional value and are a contributing factor to the growing societal problem of obesity. Moreover, Respondents have done nothing to ban dangerous trans-fats from the Fairgrounds. Public Health Authorities have established that trans-fats are a significant contributing factor to heart disease, among other health problems. Yet, once again, Respondents have chosen to ignore these health issues and focus solely on banning tobacco sales. These irrational distinctions are the very epitome of arbitrary and capricious government action.

POINT III

Respondents ACTIONS VIOLATE PLAINTIFF'S RIGHT TO FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The Supreme Court of the United States has unambiguously held that content-based restrictions on speech are presumptively invalid. See R.A.V. v. St. Paul, 505 US 377, 382 (1992).

In this case, Respondents have singled out the sale of tobacco products as part of a campaign to promote the view that tobacco products are harmful and abnormal. Whether or not Respondents' viewpoint is correct is entirely beside the point. For First Amendment purposes,

the critical point is that Respondents are seeking to silence those who promote a contrary viewpoint to theirs. In support of their ban on tobacco sales Respondents no doubt will argue that they are entitled to ban tobacco sales pursuant to their general police powers to safeguard public health. This is no answer, however. As stated by Justice Thomas in Lorillard Tobacco Co. v. Reilly, 533 US 525, 590 (2001), (Concurring Opn. by Thomas, J.):

> No legislature has ever sought to restrict speech about an activity it regarded as harmless and inoffensive. Calls for limits on expression always are made when the specter of some threatened harm is looming. The identity of the harm may vary.* * * It is therefore, no answer for the State to say that the makers of cigarettes are doing harm: perhaps they are. But in that respect they are no different from the purveyors of other harmful products, or the advocates of harmful ideas. When the State seeks to silence them, they are entitled to the protection of the First Amendment.

Respondents' own policy indicates that their purpose in enacting the tobacco ban at the fair was to "promote" a healthy environment. Thus, the Respondents unambiguously take the position that the mere presence of tobacco sellers on the premises promotes a counter viewpoint, namely that tobacco is an acceptable product in society. Respondents are trying to have their proverbial cake and eat it too. While arguing that they need to ban tobacco sales to promote the message that tobacco is unhealthy, they seek to deny others the opportunity to promote a counter message.

Whether Petitioner's act of selling tobacco constitutes constitutionally protected speech is governed by a two-part test. The court must determine whether (1) Petitioner intended to convey a message through his conduct and, (2) the likelihood that the message would be understood by those who viewed it. See Texas v. Johnson, 491 US 397, 404 (1989).

In this case, Petitioner's act of selling and promoting his tobacco products conveys the unmistakable message that smoking is acceptable in our society, rather than behavior which is stigmatized. Additionally, it is likely that those seeing Petitioner selling his products, and those seeing willing adults buying tobacco products would understand the message sought to be conveyed by Petitioner. In fact, one of Respondent's primary motivations in seeking to ban tobacco sales is to convey the very message that tobacco is an unacceptably risky product and that its use should be stigmatized. By adopting this viewpoint, Respondent's cannot logically take the polar opposite position that the act of selling tobacco does not constitute expressive conduct. Accordingly, given that Petitioner's conduct in selling tobacco constitutes expressive conduct, and Respondent's act of banning tobacco sales is utterly inconsistent with its other actions pertaining to the sale of potentially hazardous products at the Fair, Petitioner is likely to prevail on its First Amendment claims.

POINT IV

RESPONDENTS ACTIONS VIOLATE THE STATE ADMINISTRATIVE PROCEDURES ACT

In People v Cull,10 NY2d 123, 126 (1961), the Court of Appeals defined the term "rule" as:

> embrac[ing] any kind of legislative or quasi legislative norm or prescription [adopted by an administrative agency] which establishes the pattern or course of conduct for the future.

Courts have defined a rule as a "fixed and rigid policy " (Long Island College Hosp. v New York State Dept. of Health, 151 Misc 2d 370, 376 [Sup Ct, Kings County 1991], affd as modified, 203 AD2d 292 [2d Dept. 1994]); a "fixed standard" (Eden Park Health Services, Inc. v

Axelrod, 114 AD2d 721, 723 [3d Dept. 1985]); "a fixed, general principle" (Roman Catholic Diocese of Albany v New York State Dept. of Health, 66 NY2d 948, 951 [1985]; People v Fogerty, 18 NY2d 664, 668 [1966]; Hudson Valley Nursing Center v Axelrod, 130 AD2d 862, 866 [3d Dept. 1987]); "a firm, rigid, unqualified standard or policy" (Connell v Regan, 114 AD2d 273, 275 [3d Dept. 1986]); "norm or prescription" and "a rigid numerical formula" (Roman Catholic Diocese of Albany v New York State Dept. of Health, 109 AD2d 140, 145 [3d Dept.], rev'd on other grounds, 66 NY2d 948 [1985]). Courts' choice of those words to describe a rule demonstrates that a rule is a uniform policy or standard that will be applied in the same manner to each set of facts

The State Administrative Procedure Act ("SAPA") § 102(2)(a)(i), statutorily defines a rule, in pertinent part, as "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law * * * or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof." Courts have defined "rule making" to include many kinds of administrative action, thereby invoking the constitutional and statutory requirements for prior notice and filing of a rule. In particular, when agency action establishes a fixed, inflexible policy, the courts have found such action to be rule making.

Respondents have sought to promulgate a uniform fixed rule that the sale of tobacco on the fairgrounds shall not be permitted. Respondent's rule purports to set forth a firm, rigid, unqualified procedure and practice for enforcing a policy banning tobacco sales on the Fairgrounds. This rule must be annulled as it was not promulgated pursuant to the State Administrative Procedure Act.

SAPA sets forth the detailed procedural requirements for rule making by New York State agencies. SAPA requires that any agency proposing to adopt a rule must first publish a Notice of Proposed Rule Making in the State Register and afford the public an opportunity to submit comments on the proposed rule (SAPA § 202). The Notice must include a Regulatory Impact Statement, indicating, among other things, the projected costs of the rule (SAPA § 202-a[3][c]), and whether the agency considered any significant alternatives to the rule (SAPA § 203-a[2][f]). SAPA further requires that, upon adoption of the rule, the agency must publish a Notice of Adoption in the State Register. The Notice of Adoption must include an assessment of public comment on the proposed rule (SAPA § 202[5][b]).

Upon fulfilling the requirements of proposed rule making under SAPA §202(1), and upon adoption of a rule, the agency must then take steps to ensure notice to the public of the adoption of a rule. SAPA §202(5) requires that the notice of adoption of the rule be submitted to the Secretary of State, the Governor, the President of the Senate, the Speaker of the Assembly, the Administrative Regulations Review Commission (ARRC) and the Office of Business Permits and Regulatory Assistance (OBPRA).

Here, Respondents' did not follow any of the SAPA requirements. Specifically, Respondents did not file a notice of proposed rule making, did not publish a proposed rule, did not issue a regulatory impact statement or regulatory flexibility analysis, and did not afford the public an opportunity to comment. The failure to comply with these requirements renders a rule ineffective, null and void. See Cordero v Corbisiero, 80 NY2d 771 [1992]; Robinson v Perales, 166 AD2d 594 (2d Dept. 1990).

POINT V

PETITIONER WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION

The authority for a preliminary injunction and temporary restraining order is provided for in CPLR § 6301 which provides that:

> [a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do . . . an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable harm, loss or damage will result unless the defendant is restrained before the hearing can be had.

CPLR § 6301. Additionally, the court is empowered to stay the action of an administrative official pending the outcome of litigation. See CPLR 7805.

In this case, the irreparable injury prong is easily satisfied. Respondents have violated Petitioner's legal rights to freedom of expression and to be free from arbitrary and capricious government conduct by singling it out because it sells a product deemed a socially unacceptable choice by some at this point in time. A showing of a constitutional violation, in and of itself, is sufficient to establish irreparable harm. See Mitchell v. Cuomo, 748 F.2d 804 (2d Cir. 1984); Lily Pond Lane Corp. v. Technicolor, Inc., 98 Misc.2d 853, 854 (Sup. Ct. New York County, 1979)("Plaintiff has established that failure to preserve the status quo would result

in deprivation of its constitutional right to due process. This alone demonstrates irreparable harm.").

Absent an injunction, Petitioner will be barred from exercising his right to sell tobacco products at the 2007 New York State Fair. Petitioner has exercised this right for the past 10 years. Through these sales, Petitioner promotes his business and widens his clientele. Respondents' actions severely limit the options Petitioner has to promote his business in the New York market. Although Petitioner will lose the income from his lost sales at the Fair, he will also be deprived of the opportunity to exercise his rights to equal treatment under the law and to free expression under the First Amendment.

Although the mere loss of money is generally not considered irreparable harm, when that loss goes beyond compensable losses and jeopardizes a business's unknowable future earnings, such loss is deemed irreparable. See Doelker v. Kestly, 87 A.D.2d 763 (1st Dept. 1982); Willis of New York Inc. v DeFelice, 299 A.D.2d 240 (1st Dept. 2002)(loss of business is irreparable harm); Portware, LLC v. Barot, 815 NYS2d 495 (Sup. Ct. New York Cty. 2006)(granting a preliminary injunction holding that loss of business is almost impossible to quantify). Here, Petitioner has demonstrated that his harm cannot be reduced to simple monetary damages. In this situation, the loss of a customer base built through annual sales at the Fair constitutes irreparable injury beyond mere financial losses which could be compensated through litigation.

POINT VI

THE EQUITIES IN THIS CASE BALANCE STRONGLY IN FAVOR OF PETITIONER

Petitioner has demonstrated that the equities in this case balance in his favor. One thing that is clear in this case is that Petitioner has at all times conducted itself in accord with all rules and procedures set forth by the State Fair. For the last ten years, Petitioner has operated a booth at the Fair without incident. Clearly, in the past, both Petitioner and the State Fair officials have viewed Petitioner's presence at the Fair as a positive. Petitioner's booth at the Fair has generated substantial sales in the past, providing an opportunity for willing adults to use and enjoy Petitioner's product. Absent injunctive relief, the consuming public will be denied the opportunity to purchase, use and enjoy Petitioner's products.

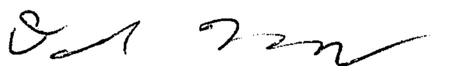
These facts, combined with the lack of any prejudice to Respondents demonstrate that the equities tilt in Petitioner's favor.

CONCLUSION

For the foregoing reasons, Petitioner's motion for a preliminary injunction allowing it to sell tobacco products at the 2007 New York State Fair should be granted.

Date: August 1, 2007
Albany, NY

Respectfully submitted,



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