STATE OF NEW YORK
SUPREME COURT CHAMBERS
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KIMBERLY A. O'CONNOR
Judge

JUSTINA CINTRÓN PERINO, ESQ.
Law Clerk

DIANE K. DEVO
Secretary

Fax Cover Sheet

To: David W. Novak, Esq. (518/436-4751)
Michael McCormick, Esq. (518/457-6468)

From: Hon. Kimberly A. O'Connor

Date: August 23, 2007

Re: *Connecticut Valley Tobacconist, LLC v. Hooker, et al.*
Index No.: 2424-07
RJI No.: 01-07-088932

Number of Pages: 14 **(Including this page)**

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Message:

See the enclosed regarding the above-referenced matter.
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August 23, 2007

Via Facsimile & U.S. Mail

David W. Novak, Esq.
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Albany, New York 12207
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Re: *Connecticut Valley Tobacconist, LLC v. Hooker, et al.*
Index No.: 2424-07
RJI No.: 01-07-088932

Dear Counselors:

Enclosed herewith is a signed Decision, Order and Judgment in the above-referenced matter. The original, together with all papers submitted, is being forwarded to Mr. McCormick for filing.

Very truly yours,

Hon. Kimberly A. O'Connor
Acting Justice of the Supreme Court

Enclosure(s)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CONNECTICUT VALLEY TOBACCONIST, LLC,

Plaintiff/Petitioner,

For a Judgment Pursuant to CPLR Article 78

DECISION AND ORDER

-against-

Index No.: 2424-07
RJI No.: 01-07-088932

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.

(Supreme Court, Albany County, Special Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES:

HINMAN STRAUB P.C.
Attorneys for Plaintiff/Petitioner
(David W. Novak, Esq., of Counsel)
121 State Street
Albany, New York 12207

RUTH A. MOORE, ESQ.
Attorney for Defendants/Respondents
(Michael McCormick, Esq. and
Sara Hall Peak, Esq., of Counsel)
10B Airline Drive
Albany, New York 12235

O'CONNOR, J.:

Plaintiff/petitioner commenced the instant CPLR Article 78 proceeding to challenge the denial of its application for a license to sell and promote tobacco products at the 2007 New York State Fair and on the New York State Fairgrounds, and to challenge a ban on the sale of tobacco products at the State Fair and on State Fairgrounds. Plaintiff/petitioner also moves for a preliminary

injunction pursuant to 6301 to enjoin defendants/respondents from denying its right to sell tobacco products at the 2007 New York State Fair.

Plaintiff/Petitioner is a Connecticut retailer of cigars and other tobacco products. Defendant/respondents are the Commissioner of the New York State Department of Agriculture and Markets and the Director of the New York State Fair. The Division of the New York State Fair, a branch within the Department of Agriculture and Markets, is responsible for presenting the State Fair, held annually over a twelve-day period in late August and early September (*see* N.Y. Agric. & Mkts. Law § 16 and Article 2-A).

From 1997 to 2006, plaintiff/petitioner applied for and was granted a license to sell and promote its products at the New York State Fair. By letter dated April 4, 2007 from Daniel O'Hara, Director of the State Fair, plaintiff/petitioner was notified that its application to sell tobacco products at the 2007 New York State Fair was denied. In support of the denial, the letter provided, in pertinent part, that "[i]n an ongoing effort to encourage and promote a healthy New York, the New York State Fair Administration in cooperation with the New York State Department of Health is creating an environment free from the sale of tobacco products. Accordingly, no tobacco products will be sold on the New York State Fairgrounds." Plaintiff/petitioner was offered an opportunity to rent space from the Fair provided, however, that he not sell tobacco products. This proceeding followed.

Plaintiff/petitioner asserts five causes of action in support of its petition: (1) that the ban on tobacco sales exceeds respondents' lawful authority; (2) that the ban is arbitrary and capricious, and without a rational basis; (3) that the ban violates its right to free speech as guaranteed by the First Amendment of the United States Constitution; (4) that the ban violates the Supremacy Clause of the

United States Constitution and is preempted by federal law; and (5) that the ban violates the State Administrative Procedures Act.

By its complaint/petition, plaintiff/petitioner seeks: (1) a judgment declaring null and void defendants/respondents' policy of banning tobacco sales on New York State Fairgrounds; (2) a permanent injunction enjoining defendants/respondents from enforcing the April 4, 2007 determination denying plaintiff/petitioner a vendor's license for the 2007 New York State Fair; and (3) a declaratory judgment that plaintiff/petitioner is entitled to a vendor's license for the 2007 New York State Fair. By their answer, defendants/respondents raise two objections in point of law to the petition: (1) that plaintiff/petitioner lacks capacity to sue and (2) that the complaint/petition fails to state a claim upon which relief can be granted, and assert that the decision to ban the sale of tobacco products at the New York State Fair was lawful, proper, and made in accordance with the law.

Initially, the Court finds that defendants/respondents' first objection in point of law fails and that plaintiff/petitioner has the legal capacity to maintain the instant action. Under § 808 (a) of the Limited Liability Company Law, "[a] foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state." The determination of "[w]hether a foreign [limited liability company] is 'doing business' [in New York] within the purview of [this] section . . . so as to foreclose access to our courts, depends upon the particular facts of [the] case with inquiry into the type of business activities being conducted" (*Great White Whale Adver., Inc. v. First Festival Prods.*, 81 A.D.2d 704, 706 [3d Dep't 1981] [citations omitted]).

As a general rule, "[t]he party relying upon this statutory barrier bears the burden of proving

that the '[limited liability company's] business activities in New York were not just casual or occasional, but "so systematic and regular as to manifest continuity of activity in the jurisdiction" (*Interline Furniture, Inc. v. Hodor Indus., Corp.*, 140 A.D.2d 307, 308 [2d Dep't 1988] citing *Alicanto v. Woolverton*, 129 A.D.2d 601, 602 [2d Dep't 1987]; *see Constr. Specialties, Inc. v. Hartford Ins. Co.*, 97 A.D.2d 808 [2d Dep't 1983]; *Int'l & Iron Corp. v. Donner Steel Co.*, 242 N.Y. 224, 224 [1926]); *Peter Matthews, Ltd. v. Robert Mabey, Inc.*, 117 A.D.2d 943, 944 [3d Dep't 1986]); *Fine Arts Enters., N.V. v. Levy*, 149 A.D.2d 795, 796 [3d Dep't 1989]; *S & T Bank v. Spectrum Cabinet Sales, Inc.*, 247 A.D.2d 373, 373 [2d Dep't 1998]; *Nick v. Greenfield*, 299 A.D.2d 172, 173 [1st Dep't 2002]). In an action brought by a foreign limited liability company, there is a presumption that it is doing business in the state of its incorporation and not in New York (*see Great White Whale Adver., Inc. v. First Festival Prods., supra*; *Alicanto v. Woolverton, supra*; *Fine Arts Enters., N.V. v. Levy, supra*; *Airline Exch., Inc. v. Bag*, 266 A.D.2d 414, 415 [2d Dep't 1999]).

Here, the proof offered by defendants/respondents shows only that plaintiff/petitioner did not obtain a certificate of authority to do business in the State under the Limited Liability Company Law, despite having sold its products at the New York State Fair for the past ten years. Defendants/respondents have made no showing regarding plaintiff/petitioner's business activities in New York to sustain its prime facie burden of establishing that plaintiff/petitioner is doing business in the State. Specifically, defendants/respondents have failed to show that petitioner/plaintiff's participation in the State Fair as a vendor constituted more than casual or occasional transactions over the ten-year period or that its business activities in New York have been so systematic and regular to manifest a continuity of activity in the State (*see Peter Matthews, Ltd. v. Robert Mabey, Inc., supra*; *Fine Arts Enters., N.V. v. Levy, supra*; *Constr. Specialties, Inc. v.*

Hartford Ins. Co., supra; *Int'l Fuel & Iron Corp. v. Donner Steel Co.*, [illegible]. Therefore, the presumption that plaintiff/petitioner is doing business in its state of incorporation and not in New York has not been overcome, and plaintiff/petitioner is not statutorily barred from maintaining this action (*see Constr. Specialties, Inc. v. Hartford Ins. Co., supra*; *Airline Exch., Inc. v. Bag, supra*; *Nick v. Greenfield, supra*).

The Court further finds that defendants/respondents' second objection in point of law fails as the petition does state a claim on its face. On an objection in point of law to a petition for failure to state a claim under CPLR 3211(a)(7) and 7804(f), the Court must "accept the facts as alleged in the [petition] as true, accord [plaintiff/petitioner] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Matter of Niagara Mohawk Power Corp. v. State of New York*, 300 A.D.2d 949, 952 [3d Dep't 2002] citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]; *Virgem Enters., Inc. v. City of New York*, 290 A.D.2d 708, 708 [3d Dep't 2002] [citations omitted]; *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001]).

Applying these principles, the Court finds that plaintiff/petitioner has met its initial burden and alleged sufficient facts to state a claim that defendants/respondents' denial of a vendor's license to plaintiff/petitioner and ban on the sale of tobacco products at the 2007 New York State Fair and on New York State Fairgrounds: (1) is outside the scope of their authority to issue licenses and to limit an otherwise lawful activity; (2) is arbitrary and capricious, and without a rational basis, by virtue of the fact that the ban doesn't limit possession and use of tobacco products and that other retailers of purportedly "dangerous" and "unhealthy" products were granted a vendor's license to sell and promote those products at the 2007 New York State Fair and on the New York State

Fairgrounds; (3) violates its right to free speech as guaranteed by the First Amendment of the United States Constitution by restricting petitioner's ability to convey a social message; (4) violates the Supremacy Clause of the United States Constitution and is preempted by federal law by regulating the sale and promotion of tobacco products; and 5) violates the State Administrative Procedures Act by failing to comply with SAPA procedures prior to implementation of a "rule."

Turning to the merits of plaintiff/petitioner's arguments, the main inquiry in this proceeding is whether or not defendants/respondents had the authority to deny plaintiff/petitioner's application to sell its tobacco products at the 2007 New York State Fair and effectively ban the sale of tobacco products at the New York State Fairgrounds. Essential to this inquiry is whether or not the enabling authority governing the issuance of a vendor's license for the New York State Fair intended that the act of issuing a vendor's licenses be ministerial in nature. Based upon the plain language of the regulations, it is clear that it was not. Under 1 NYCRR § 369.2, which governs the issuance of a solicitor's license for the New York State Fair:

> Licenses shall be issued in the order in which applications are received and on a nondiscriminatory basis, without regard to the content of the message the applicant wishes to convey, *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*. [emphasis added].

Notwithstanding plaintiff/petitioner's arguments to the contrary, defendants/respondents are expressly authorized, by regulation, to deny a vendor's license to a prospective licensee of the State Fair under certain circumstances. Specifically applicable here is the public policy exception.

Plaintiff/petitioner contends that the ban on the sale of tobacco at the New York State Fairgrounds and the denial of its application for a vendor's license exceeded defendants/respondents' lawful authority because it is in direct contravention of their own regulatory command, effectively

limits the availability of a lawfully sold product to adults who wish to buy the product, and is based solely upon discriminatory and subjective social preferences. Plaintiff/petitioner further contends that the ban is arbitrary and capricious, and thus without a rational basis, because it is the first time in New York State Fair history in which the sale of tobacco has been affirmatively banned and because it singles out the sale of tobacco products, but allows the use and possession of tobacco as well as the sale of other "dangerous" and "unhealthy" products. Defendants/respondents assert that the ban on tobacco sales and the denial of plaintiff/petitioner's application for a vendor's license was made in furtherance of New York's tobacco policy as implemented by the New York State Department of Health.

It is undisputed that a tobacco policy exists in New York State. While plaintiff/petitioner correctly argues that there is no law prohibiting the sale of tobacco products in the State, clear and recognized public policies have been adopted statewide to regulate and restrict the use and sale of tobacco and tobacco products, to prevent the initiation of tobacco use among youth and young adults, to promote the cessation of tobacco use among adults, to eliminate nonsmokers' exposure to second-hand smoke, and to decrease the social acceptability of tobacco use. Here, defendants/respondents have demonstrated to the Court's satisfaction that permitting the sale of tobacco products at the New York State Fairgrounds would be contrary to public policy, especially since the State Fair is promoted, sponsored, and held by the State through one of its administrative agencies. Given the express language of the solicitor's licensing regulations and New York's prevailing tobacco policy, the Court finds that defendants/respondents did not exceed their lawful authority in denying plaintiff/petitioner's application for a vendor's license for the 2007 New York State Fair and banning the sale of tobacco products at the New York State Fairgrounds.

Furthermore, the Court finds that the ban on the sale of tobacco products at the New York State Fairgrounds and the denial of plaintiff/petitioner's application for a vendor's license was not arbitrary and capricious, and was thus was rationally based. An action is arbitrary and capricious when it is "taken 'without sound basis in reason and . . . without regard to the facts'" (*Matter of Konski Eng'rs, P.C. v. Levitt*, 69 A.D.2d 940, 942 [3d Dep't 1979] quoting *Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 [1974]; *accord Matter of Heintz v. Brown*, 80 N.Y.2d 998, 1001 [1992]; *see Matter of Grella v. Hevesi*, 38 A.D.3d 113, 116 [3d Dep't 2007]). The court's "function is limited to whether the administrative action may be supported on any rational basis" (*Matter of C.K. Rehner, Inc.* [City of New York], 106 A.D.2d 268, 270 [1st Dep't 1984]), and the court may not disturb factual determinations (*see Matter of Heintz v. Brown, supra*), weigh the evidence (*see Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, supra* at 230), or substitute its judgment for that of the administrative official (*see id.* at 230-31).

In his sworn affidavit, defendant/respondent O'Hara avers that "[b]ased upon New York State's policy concerning tobacco and tobacco products, it made little sense for the State Fair to make tobacco products available for purchase during the State Fair, while the New York State Department of Health was promoting cessation of smoking." (Affidavit of Daniel O'Hara at ¶ 9). Additionally, defendants/respondents submit proof of New York's tobacco policy and its efforts in furtherance of such policy, including a report from the Department of Health addressing tobacco use in the State as well as information on statewide efforts and programs promulgated under the policy. (*see* Defendant/Respondents' Memorandum of Law, Exs. A & B). Because defendant/respondents'

determination banning the sale of tobacco products at the New York State Fairgrounds and denying plaintiff/petitioner's application for a vendor's license has a rational basis in the record before the Court, it was neither arbitrary nor capricious and, therefore, will not be disturbed (*see Crest Mainstream, Inc. v. Mills*, 257 A.D.2d 969, 971 [3d Dep't1999]).

Moreover, the Court rejects plaintiff/petitioner's argument that its promotional material for its tobacco products and its conduct of selling tobacco products at the State Fair and on State Fairgrounds are protected by the free speech clause of the First Amendment to the United States Constitution. "Because the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech," the Court "must first determine the proper classification of the [material] at issue here" (*Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 [1983]). Plaintiff/petitioner asserts that its promotional material is constitutionally protected commercial speech. However, the classification of plaintiff/petitioner's promotional material as commercial speech depends upon whether the material "fall[s] within the core notion of commercial speech-'speech which does no more than propose a commercial transaction'" (*Bolger v. Youngs Drug Prods. Corp.*, *supra* at 66, quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 [1976] [internal quotations and citations omitted]). Based on a review of the material, the Court finds that it does.

Next, the Court must examine whether the defendants/respondents' ban on the sale of tobacco products at the State Fair is a permissible governmental restriction on commercial speech under the four-part analysis in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 [1980]. Applying the analysis set forth by the Supreme Court in *Central Hudson*, the Court finds that plaintiff/petitioner's promotional material is commercial speech entitled

to protection under the First Amendment (*Id.*). However, defendants/respondents have sufficiently demonstrated that the State has a substantial interest in promoting the goals of its tobacco policy, that this policy interest is directly advanced by the ban on tobacco sales at the State Fair and on State Fairgrounds, and that the ban on tobacco sales is no more extensive than necessary to serve such policy (*Id.*). As such, the ban is a permissible governmental restriction, and plaintiff/petitioner's promotional material is not afforded the protection of the First Amendment.

Likewise, plaintiff/petitioner's conduct of selling tobacco products is not protected by the First Amendment. "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," the Court must look at "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it'" (*Texas v. Johnson*, 49 U.S. 397, 404 [1989], quoting *Spence v. State of Washington*, 418 U.S. 405, 410-411 [1974]). While "[i]t is possible to find some kernel of expression in almost every activity a person undertakes-for example, walking down the street or meeting one's friends at a shopping mall-but such a kernel is not sufficient to bring the activity within the protection of the First Amendment" (*City of Dallas v. Stanglin*, 490 U.S. 19, 25 [1989]). To fall within the scope of the First Amendment, the activity or conduct must be "sufficiently imbued with elements of communication" (*Texas v. Johnson*, *supra* at 404, quoting *Spence v. State of Washington*, *supra* at 409). "Courts that have found protectable expression in conduct have done so because the expressive component was the primary, if not the sole, purpose of the act" (*NYC C.L.A.S.H., Inc. v. City of New York*, 315 F.Supp.2d 461, 478 [S.D.N.Y 2004]).

Here, the mere conduct of selling tobacco products is not the type of expressive speech contemplated by the First Amendment and entitled to its protection (*see NYC C.L.A.S.H., Inc. v. City*

of New York, supra at 476; *c.f. Brown v. Louisiana*, 383 U.S. 131 [1966]; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 [1969]; *Schacht v. United States*, 398 U.S. 58 [1970]; *United States v. Grace*, 461 U.S. 171 [1983]; *United States v. Eichman*, 496 U.S. 310 [1990]; *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 [1995]). Plaintiff/petitioner's conclusory assertion that its act of selling and promoting its tobacco products conveys an unmistakable message that smoking is acceptable in our society is simply not supported in the record.

Even if there were some evidence before the Court to support the argument that the act of selling tobacco products conveys a particularized message or expression of the social acceptance of smoking, it is not clear whether the message would be understood by those who observed the act (*see NYC C.L.A.S.H., Inc. v. City of New York, supra* at 479). Finally, even assuming there is an element of detectable expression in plaintiff/petitioner's conduct that would afford it First Amendment protection, the government is generally given greater leeway in restricting expressive conduct and may permissibly do so where there is a sufficiently important governmental interest at stake, which is present here (see *Texas v. Johnson, supra* at 407; *see NYC C.L.A.S.H., Inc. v. City of New York, supra* at 479).

The Court has considered plaintiff/petitioner's remaining claims and finds them to be without merit. Based on the foregoing, plaintiff/petitioner's motion for preliminary injunction is denied as academic.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that the petition is denied and dismissed in all respects; it is further

ORDERED AND ADJUDGED, that the motion for a preliminary injunction is denied.

This memorandum shall constitute the Decision, Order and Judgment of the Court. All papers, including this Decision, Order and Judgment, are being returned to the attorney for respondent. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: August 23, 2007
Albany, New York

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition/Summons, dated July 6, 2007; Verified Complaint/Petition, dated July 6, 2007, with Exhibits A & B annexed;
2. Notice of Motion, dated August 6, 2007; Plaintiff/Petitioner's Memorandum of Law, dated August 1, 2007;
3. Objection in Point of Law/Verified Answer, dated August 13, 2007; Affidavit of Daniel O'Hara, dated August 7, 2007; Affirmation of Michael McCormick, Esq., dated August 13, 2007, with Exhibits A & B annexed; Defendants/Respondents' Memorandum of Law, dated August 17, 2007, with Exhibits A & B;
4. Reply Letter Brief, dated August 16, 2007, with an unmarked exhibit annexed; Affidavit of Michael Tarnowicz, dated 16, 2007, with two unmarked exhibits annexed.