

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CONNECTICUT VALLEY TOBACCONIST, LLC,

Plaintiff/Petitioner,

-against-

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.

VERIFIED
COMPLAINT/PETITION

Index No.
Purchased On:

For a Judgment Pursuant to CPLR Article 78

Plaintiff/Petitioner (hereinafter "Plaintiff"), Connecticut Valley Tobbaconist, LLC, through its attorneys, Hinman Straub, P.C., for its Complaint/Petition (hereinafter "Complaint"), against Defendants/Respondents (hereinafter "Defendants"), states:

PARTIES

1. The Plaintiff is a business engaged in the sale of Tobacco products, located at 337 Hazard Avenue, Enfield, Connecticut 06082.
2. Defendant Patrick Hooker is the Commissioner of the New York State Department of Agriculture and Markets, and is sued in that capacity.
3. Defendant Daniel O'Hara is the Director of the New York State Fair, and is sued in that capacity.

FACTS

4. Plaintiff Connecticut Valley Tobacconist is a business which sells cigars and other tobacco products and promotes their general use and enjoyment.

5. The New York State Fair is an annual twelve day event held on the 375 acre New York State Fairgrounds in Syracuse.

6. The 2007 State Fair is currently scheduled to run from August 23-September 3.

7. For the past ten years, from 1997-2006, Plaintiff has applied for and been granted a license to sell and promote its tobacco products at the New York State Fair.

8. As part of the face-to-face sales process at the Fair, Plaintiff's employees confirm that the person purchasing the product is over the age of 18 and is, therefore, lawfully permitted to purchase tobacco products.

9. In addition to selling tobacco products at the Fair, at its booth on the Fairgrounds Plaintiff promotes its products, including its own brand of cigars, through the distribution of literature promoting both its storefront and its internet store. A copy of promotional material used by Plaintiff is attached as Exhibit "A."

10. In addition to the State Fair held every summer, the New York State Fairgrounds hosts numerous other events throughout the year, including horse shows, gun shows, cultural and artistic exhibitions, and concerts.

11. The New York State Fair solicits and allows vendors to sell commercial products at the New York State Fair, both during the State Fair and during other events held on the Fairgrounds.

12. Tobacco products have been lawfully sold at the New York State Fair and on the Fairgrounds for at least several decades.

13. By letter dated April 4, 2007, Defendant Daniel O'Hara denied Plaintiff a license to sell his products at the 2007 New York State Fair. A copy of Defendant O'Hara's April 4, 2007 letter is attached hereto as Exhibit "B."

14. As stated in the April 4, 2007 letter, Defendant O'Hara's purported reason for denying Plaintiff a vendor's license at the 2007 New York State Fair was "an ongoing effort to encourage and promote a healthy New York."

15. The purpose of the ban on tobacco sales on the State Fairgrounds is not to protect people from health issues associated with tobacco smoke, rather the purpose is to "send a message" that smoking is bad and should not be condoned.

16. The sale and promotion of tobacco products are seen by anti-smoking advocates as the propagation of a pernicious idea, namely, that smoking should be accepted in American society, in addition to what they perceive as the protection of public health.

17. Despite Defendants asserted desire to promote health and create a "healthy" environment at the 2007 State Fair, Defendants have only banned the sale of tobacco products on the Fairgrounds, they have not banned the actual use or possession of tobacco products.

18. This distinction is arbitrary and capricious, and demonstrates the absurdity of Defendants' ban on the sale of tobacco, a legal product, to willing adults making an informed choice, at the Fair.

19. Additionally, Defendants are allowing numerous other provably "unhealthy" products to be sold at the 2007 State Fair.

20. These other unhealthy products, which are permitted to be sold at the 2007 State Fair and on the Fairgrounds generally, include alcoholic beverages; foods with saturated fats and trans-fats, recently banned in New York City, and drinks laden with corn syrup and/or processed sugar.

21. Defendants also allow the sale of firearms on the State Fairgrounds.

22. A gun show is currently scheduled to occur on the Fairgrounds on September 15-16, 2007.

23. Defendants have adopted a rigid policy and practice of banning the sale of tobacco products at all events held on the State Fairgrounds, in addition to the State Fair itself, while permitting numerous "dangerous" and "unhealthy" products to be sold at the same time.

**AS AND FOR A FIRST CAUSE OF ACTION TO NULLIFY, AS EXCEEDING ITS
LAWFUL AUTHORITY, DEFENDANTS' BAN ON THE SALE OF TOBACCO
PRODUCTS ON THE NEW YORK STATE FAIRGROUNDS**

24. Plaintiff repeats and realleges all foregoing allegations.

25. Defendants' policy of banning the sale of tobacco products on the New York State Fairgrounds exceeds its authority.

26. No law or public policy exists against the sale of tobacco products to adults.

27. No law exists granting Defendants authority to ban the sale of tobacco on the State Fairgrounds.

28. Defendants' actions effectively limit, in a manner not authorized by law, the availability of a lawfully sold product to adults who wish to buy that product.

29. Defendants policy of banning the sale of tobacco products on the New York State Fairgrounds is based solely upon discriminatory and subjective social preferences and are not based in lawful considerations within Defendants' authority.

30. Defendants actions in this case were outside their proper scope of authority in issuing licenses on a non-discriminatory basis to sell products on the State Fairgrounds.

31. Plaintiff meets all the qualifications for a vendor's license at the 2007 State Fair.

32. For all the foregoing reasons, Plaintiff is entitled to a judgment nullifying Defendants' ban on the sale of tobacco products at the 2007 New York State Fair and on the New York State Fairgrounds.

33. Plaintiff is also entitled to a judgment declaring its entitlement to sell tobacco products at the 2007 New York State Fair and on the New York State Fairgrounds.

AS AND FOR A SECOND CAUSE OF ACTION NULLIFYING DEFENDANTS' BAN ON THE SALE OF TOBACCO PRODUCTS ON THE NEW YORK STATE FAIRGROUNDS AS ARBITRARY AND CAPRICIOUS

34. Plaintiff repeats and realleges all foregoing allegations.

35. Defendants' actions in banning the sale of tobacco products at the 2007 State Fair marks the first time in the Fair's history that the sale of tobacco has been affirmatively banned.

36. The State's own prior actions in permitting the sale of tobacco at the Fair establishes that no public policy or legitimate public health concern exists against the sale of tobacco on the State Fairgrounds.

37. No reasonable basis exists to ban the sale of tobacco on the Fairgrounds while simultaneously allowing the use and possession of tobacco.

38. It is arbitrary and capricious to single out the sale of tobacco products, while allowing the sale of firearms on the Fairgrounds, in addition to dangerous and addictive alcoholic beverages and numerous demonstrably unhealthy fatty and sugary foods and beverages.

39. For all the foregoing reasons, Plaintiff is entitled to a judgment nullifying Defendants' ban on the sale of tobacco products at the 2007 New York State Fair and on the New York State Fairgrounds.

40. Plaintiff is also entitled to a judgment declaring its entitlement to sell tobacco products at the 2007 New York State Fair and on the New York State Fairgrounds.

AS AND FOR A THIRD CAUSE OF ACTION PURSUANT TO THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

41. Plaintiff repeats and realleges all foregoing allegations.

42. Plaintiff's business both sells tobacco products and promotes the use and enjoyment of tobacco products.

43. Plaintiff's conduct in selling its tobacco products is conduct protected by the free speech clause of the First Amendment to the United States Constitution.

44. Plaintiff's promotional material for its products is constitutionally protected commercial speech.

45. In selling and promoting its products, Plaintiff conveys a social message that tobacco is a product which can be enjoyed by adults and which should not be stigmatized.

46. Members of the public who purchase Plaintiff's products and see its promotional materials are likely to understand the social message conveyed by Plaintiff.

47. Defendants' ban on the sale of tobacco products on the Fairgrounds is a content based restriction on the First Amendment right of free speech.

48. In banning the sale of tobacco on the Fairgrounds, Defendants are attempting to convey a social message that smoking is neither safe nor acceptable behavior.

49. Content based restrictions on free speech are presumptively invalid.

50. In light of Defendants' position that banning sales, displays or promotional material conveys a social message against the use of tobacco products, Defendants' actions deny Plaintiff the opportunity to convey a conflicting message that consenting and informed adults are entitled to purchase, use and enjoy tobacco products.

51. Only tobacco products have been singled out by Defendants for banning.

52. Other products, such as firearms, alcohol and fatty and sugary foods and beverages, which are dangerous to human health, have not been banned.

53. The singling out of tobacco products demonstrates that Defendants' actions are nothing more than a pernicious attempt to silence those who continue to promote the use and enjoyment of tobacco products.

54. Because Defendants' actions violate the First Amendment to the United States Constitution, they should be annulled and Plaintiff is entitled to a declaration

recognizing his right to sell and promote tobacco products at the New York State Fair and on the New York State Fairgrounds.

AS AND FOR A FOURTH CAUSE OF ACTION NULLIFYING RESPONDENTS' ACTIONS UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND AS PREEMPTED BY FEDERAL LAW

55. Plaintiff repeats and realleges all prior allegations as if fully restated herein.

56. Under 42 U.S.C. § 300x-26, the State of New York receives federal funds, conditioned on the State taking measures to reduce the extent to which tobacco products are available to individuals under the age of 18.

57. Under 15 U.S.C. § 1334, the State of New York, and all States, are prohibited from regulating the advertising or promotion of tobacco products, labeled in conformity with federal law.

58. Implicit in the federal statutory scheme is that States are precluded from banning or constraining the face-to-face sale and promotion of tobacco products to adults.

59. By banning the sale of tobacco products on the State Fairgrounds, the Defendants are regulating the sale and promotion of tobacco products in a manner which conflicts with federal law.

60. As such, Defendants' actions conflict with Federal law and should be annulled, and Plaintiff is entitled to a judgment declaring his right to sell tobacco products on the New York State Fairgrounds.

AS AND FOR A FIFTH CLAIM OF RELIEF FOR VIOLATION OF THE STATE ADMINISTRATIVE PROCEDURES ACT

61. Plaintiff repeats and realleges all foregoing allegations as if fully restated herein.

62. The Department of Agriculture and Markets and the Division of the State Fair are agencies of the State of New York as defined in section 102(1) of the New York State Administrative Procedures Act.

63. A “rule,” within the meaning of SAPA section 102(2)(a), is:

the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and (ii) the amendment, suspension, repeal, approval, or prescription for the future of rates, wages, security authorizations, corporate or financial structures or organization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing, whether of general or particular applicability.

64. Defendants’ policy of banning the sale of tobacco on the State Fairgrounds is a rule within the meaning of SAPA.

65. Pursuant to SAPA § 202, prior to the adoption of a rule, an administrative agency is required to submit a notice of the proposed rule to the Secretary of State for publication in the State Register and is mandated to afford the public an opportunity to submit comments on the proposed rule. The proposed rule must then be published in the State Register for at least 45 days prior to the enactment of the regulation.

66. To date, Defendants have not submitted a notice of the proposed rule to the Secretary of State for publication in the State Register or afforded the public an opportunity to submit comments on the change. Nor have they published the change in the State Register for at least 45 days prior to its implementation.

67. Therefore, Defendants challenged policy regarding the sale of tobacco on the State Fairgrounds violates the State Administrative Procedures Act and should be annulled, and Plaintiff is entitled to a declaration affirming its right to sell and promote tobacco products at the 2007 State Fair and on the Fairgrounds generally.

WHEREFORE, the Plaintiff demands Judgment against Defendants, as follows:

- A. A judgment declaring null and void Defendants' policy of banning tobacco sales on the New York State Fairgrounds.
- B. A permanent injunction enjoining Defendants from enforcing the April 4, 2007 determination denying Plaintiff a vendor's license at the 2007 State Fair.
- C. A declaratory judgment that Plaintiff is entitled to a vendor's license at the 2007 State Fair.
- D. The Costs and disbursements of this action.
- E. For such other and further relief as the Court seems just and proper.

Dated: Albany, New York
July 6, 2007

David W. Novak

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