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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiff-Appellant,

-v.-

NEW YORK CITY BOARD OF HEALTH, ET AL.,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
2008 CIV. 1000 (RJH)

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**OPPOSITION TO MOTION  
FOR A STAY PENDING APPEAL**

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APRIL 23, 2008

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiff-Appellant,

-against-

08 Civ. 1000 (RJH)

NEW YORK CITY BOARD OF HEALTH, NEW YORK  
CITY DEPARTMENT OF HEALTH AND MENTAL  
HYGIENE, and THOMAS R. FRIEDEN, In His Official  
Capacity as Commissioner of the New York City  
Department of Health and Mental Hygiene,

Defendants-Appellees.

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**DEFENDANTS' RESPONSE IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR A STAY PENDING  
APPEAL**

Defendants, the New York City Board of Health, the New York City Department of Health and Mental Hygiene ("DOH"), and Thomas R. Frieden, in his official capacity as Commissioner of DOH (collectively the "City"), by their attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, submit this response in opposition to the motion by plaintiff, the New York State Restaurant Association ("NYSRA" or "plaintiff"), for an order enjoining the enforcement of New York City Health Code §81.50 pending determination of its appeal from the Memorandum Opinion and Order of the United States District Court for the Southern District of New York (Holwell, U.S.D.J.) filed April 16, 2008. Submitted herewith is the Declaration of Fay Ng, dated April 23 2008, in opposition to plaintiff's motion for a stay pending appeal ("Ng Declaration").

**PROCEDURAL HISTORY AND THE STAY IN EFFECT**

In this action, plaintiff seeks to declare Health Code §81.50 adopted by the Board of Health unconstitutional. Section 81.50 requires certain restaurants to post calorie information

on their menus and menu boards. Specifically, plaintiff asserts that Section 81.50 (1) is preempted by a provision of the federal Nutrition Labeling and Education Act of 1990 ("NLEA"), and (2) violates its First Amendment rights. Before the District Court, plaintiff moved for summary judgment, and in the alternative, for preliminary injunctive relief on its preemption claim. Plaintiff sought a preliminary injunction on its First Amendment claim. The City cross-moved for summary judgment on the preemption claim.

Section 81.50 was to become effective March 31, 2008. When the parties were advised by the District Court that a decision on the motions would be issued in the first two weeks of April, the City agreed to take no enforcement action until April 14, 2008. This "no enforcement" period was then extended by the parties until April 21, 2008 after the parties were informed by the judge's clerk that a decision would be issued after April 14, 2008. The City also agreed to a six-week phase-in of enforcement during which it would conduct compliance inspections and issue notices of violations, but not seek monetary fines for those violations.

On April 16, 2008, the District Court granted the City's cross-motion for summary judgment on plaintiff's preemption claim and denied plaintiff's application for a preliminary injunction on its First Amendment claim ("Dist Ct. Sum. Judgment Dec."). A copy of the decision is annexed to the Ng Declaration as Exhibit "A".

In a Memorandum Opinion and Order dated April 18, 2008, the District Court denied plaintiff's application for a stay pending appeal. The District Court, however, granted plaintiff interim relief to permit plaintiff time to seek relief from this Court. All enforcement of section 81.50 is stayed through and including April 25, 2008. The City may not seek monetary

finer for violations of section 81.50 through and including June 6, 2008 ("Dist. Ct. Stay Dec."). A copy of the Order is annexed to the Ng Declaration as Exhibit "B".<sup>1</sup>

### ARGUMENT

In determining whether this Court should enjoin the enforcement of Health Code §81.50 pending determination of plaintiff's appeal pursuant to Fed. R. App. P. 8, four factors should be considered: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." In Re: World Trade Center Disaster Site Litigation v. The City of New York, 503 F.3d 167, 170 (2d Cir. 2007) (citation omitted); see also, Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002).

"The degree to which a factor must be present varies with the strength of the other factors, meaning that 'more of one [factor] excuses less of the other.'" In Re World Trade Center Disaster Site, 503 F.3d at 170. As discussed below, the public interest lies heavily against enjoining section 81.50 pending determination of plaintiff's appeal because any delay in the enforcement of section 81.50 is likely to have a negative impact on the public health. The public interest outweighs plaintiff's presumed irreparable harm and its minimal possibility of success on the appeal.

#### A. Likelihood of Success

This Court has applied various formulations of the degree of the showing of success a movant must establish. Mohammed, 309 F.3d at 100-101. Plaintiff relies on the

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<sup>1</sup> Independent of this litigation, the City had voluntarily agreed not to seek fines against restaurants for violations of section 81.50 for six weeks after its effective date. This agreement not to enforce was extended by the District Court's order.

“substantial possibility” standard, while the City submits that an enhanced standard similar to the “clear or substantial likelihood of success on the merits” test should be applied because plaintiff is seeking to enjoin “government action taken in the public interest pursuant to a statutory or regulatory scheme” Sussman v. Crawford, 488 F.3d 136, 140 (2d Cir. 2007). It matters not, however, which formulation is applied herein because as the District Court properly found, in denying plaintiff’s stay application, plaintiff’s possibility of success on appeal “is modest”, at best. Dist. Ct. Stay Op., pp. 2-3.

In granting the City summary judgment on plaintiff’s preemption claim and denying plaintiff preliminary injunctive relief on its First Amendment claim, the District Court conducted a detailed analysis of the relevant law and facts. The District Court rendered its opinion after the parties had a full opportunity to litigate the issues, which included full briefing and the submission of numerous declarations and documentary evidence. In the interest of judicial economy, we will not repeat the comprehensive discussion in the District Court’s opinions on the merits and on the stay application and respectfully refer the Court to those opinions. Ng Declaration, Exhibits “A” and “B”.

#### **B. Irreparable Harm**

Plaintiff has not argued that it would suffer economic harm if it were required to comply with section 81.50 during the pendency of this litigation. Rather, it asserts that it will suffer *per se* irreparable harm. Although irreparable harm is generally presumed where a party asserts that its First Amendments rights have been violated, this Court should consider the degree of that purported *per se* harm in light of the type of speech which is involved. Section 81.50 requires only the disclosure of factual information and does not involve classic expression of

opinion.<sup>2</sup> The Court in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), explained that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," and the speaker's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal." Id. (emphasis in original). As the District Court properly determined "[w]hile the *per se* irreparable harm associated with an unconstitutional commercial disclosure requirement would not be unimportant, it would appear to be of a lower order than that associated with government action implicating core First Amendment value." Dist Ct. Stay Op, pps. 4-5.

Similarly, although arguably irreparable harm is presumed where the government seeks to enforce a local law that is purportedly preempted by federal law, the degree of this *per se* irreparable harm is of a lower order. See, Dist. Ct. Stay Op. pp. 5-6.

**C. A Delay In The Implementation of Section 81.50 Will Have A Negative Impact On The Public Health. Therefore, The Public Interest Lies In Section 81.50's Immediate Implementation.**<sup>3</sup>

There can be no dispute that the City has a substantial interest in curbing the obesity epidemic and the health risks associated with it as described in Commissioner Frieden's Declaration ("Frieden Decl.") dated February 8, 2008, at paragraphs 3, 11 -14. A copy of Commissioner Frieden's Declaration (exhibits not included) is annexed as Exhibit "C" to the Ng Declaration. Plaintiff's own expert, Dr. David Allison, has conceded that "it is reasonable to conjecture that providing calorie information at the point of purchase in restaurants (especially in

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<sup>2</sup> In fact, some members of NYSRA have already publicly disclosed calorie content in other formats.

<sup>3</sup> As noted by the District Court, harm to the City's interest and the public interest, the third and fourth factors to be considered in determining a motion for a stay pending appeal, "largely overlap" in this case.

fast food restaurants) might be beneficial in reducing obesity levels." See Declaration of David Allison, dated January 29, 2008, at pages. 14, 33, annexed as Exhibit "P" to the Declaration of Nancy Milburn, dated April 22, 2008, submitted in support of plaintiff's motion for a stay pending appeal.

Information as to the calorie content of restaurant food permits consumers to make more informed choices, allowing them to reduce their calorie intake beyond the modest reductions discussed above. A study found that when calorie information is readily available, high-calorie menu items are chosen 24% to 37% less often. Frieden Decl. ¶32.

Consumers, however, consistently and substantially underestimate the calorie content of food items. Even plaintiff's expert, David Allison, agrees with this assertion. Allison Decl., at pages 10-11. One study found that 9 out of 10 people underestimate the calories count of less-healthy items by an average of almost 50% less than the actual calorie count. Frieden Decl. ¶ 26. Even nutrition professionals have difficulty estimating the calorie count of restaurant food and one study found that dietitians underestimate calories in restaurant food by 200 to 600 calories. In this survey, dietitians estimated on average that a typical diner hamburger with onion rings meal had 865 calories when it actually had 1,550 calories. Frieden Decl. ¶ 27.

It is estimated that the posting of calorie information on menus and menu boards has the potential to affect consumer choices involving at least 145 million meals in New York City per year and possibly as many as 500 million or more. See, Frieden Decl. ¶47. Thus, each month its implementation is delayed, another 10 million meals are served at chain restaurants in New York City without point of purchase calorie information, further worsening the obesity epidemic and its related health risks.

Although some of plaintiff's members have provided calorie information on the internet, on tray liners and in brochures, these practices are inadequate in that they do not provide the consumer with the information at the point of purchase. See, Frieden Decl. ¶¶ 37-47. Moreover, this "voluntary" approach is not effective because not all restaurants which are covered by section 81.50 have "voluntarily" posted.

Even a modest reduction of 300 calories twice per week can result in weight loss of more than eight pounds a year. Frieden Decl. ¶18. Further, "[e]ven small changes, e.g., eating just 10 more calories per day over the course of a year, can result in weight gain of one pound." Frieden Decl. ¶ 20. Thus, any delay in the implementation of section 81.50 can harm the health of New Yorkers, increasing the rate of obesity, diabetes and other health problems.

Rather than addressing the important impact that calorie disclosure could have on the public's health, plaintiff attacks the Board of Health for enacting section 81.50 through the legislative process rather than invoking its emergency public health powers. Plaintiff also criticizes the City for agreeing to short stays of enforcement during the pendency of this litigation in order to permit the District Court the opportunity to fully consider plaintiff's challenges. See, Plaintiff's Emergency Motion to Continue Stay Pending Appeal, pp. 18-19. Plaintiff's arguments are completely meritless. The fact that the Health Department did not use its emergency powers and agreed to short stays of enforcement does not mean that the implementation of this important health initiative should be delayed pending appeal now that a Court has upheld section 81.50 after careful review. Further, it is disingenuous for plaintiff to criticize the Department of Health for agreeing to a grace period during which no fines will be levied. During that period, Department of Health will enforce and issue Notice of Violations.

As discussed above, a further delay in the implementation of section 81.50 will likely have a negative impact on the public health. Based on the above, the public interest lies in not delaying the implementation of section 81.50 pending determination of this appeal. The public interest outweighs any purported *per se* irreparable harm and plaintiff's minimal possibility of success on its appeal. Therefore, plaintiff's application to enjoin enforcement of section 81.50 pending appeal should be denied.

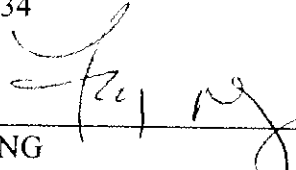
### CONCLUSION

For the reasons set forth above, the City respectfully requests that plaintiff's motion be denied.

Dated: New York, New York  
April 23, 2008

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