

08-1892-CV

UNITED STATES COURT OF APPEALS  
*for the*  
SECOND CIRCUIT

NEW YORK STATE RESTAURANT ASSOCIATION,

*Plaintiff-Appellant,*

v.

NEW YORK CITY BOARD OF HEALTH, *ET AL.*,

*Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK IN 2008 CIV. 1000  
HONORABLE RICHARD J. HOLWELL

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**REPLY IN FURTHER SUPPORT OF EMERGENCY MOTION TO  
CONTINUE STAY OF ENFORCEMENT PENDING APPEAL**

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April 24, 2008

As Plaintiff-Appellant, New York State Restaurant Association's opening memorandum demonstrates, this case raises serious constitutional questions of first impression. Defendants' opposition papers fail to offer any basis on which this Court should deny Plaintiff's request for a stay, pending an expedited appeal, of enforcement of the City's calorie-labeling regulation while this Court addresses those issues.

First, Defendants state that Plaintiff is "criticiz[ing]" and "attack[ing]" them for not invoking the City of New York's emergency powers and for agreeing to stays of enforcement. Def. Opp. at 7. To the contrary, Plaintiff thinks that Defendants' actions in these regards were entirely appropriate. Defendants' actions do, however, belie their present contention that there would be a serious threat to the public health if the Court were to grant a further stay while it decides the merits of this case. The fact is that the entire period from September 2006 (when the City first proposed the regulation at issue in *NYSRA I*), through April 21, 2008 (when the last stay on consent expired), is attributable to Defendants' own decisions about when the regulations at issue in *NYSRA I* and *II* would be proposed, when the regulations would be promulgated, when they would become effective, and the decisions by Defendants to consent to stays of enforcement while the cases were pending in the district court. Pl. Mem. at 1-3.

Second, although Defendants assert in their opposition that a further stay “will likely have a negative impact on the public health,” Def. Opp. at 8, that assertion goes well beyond what Defendants actually proved in the district court. *See* Pl. Mem. at 15-16, 19. And it is not what the district court found. What the district court said was that it “seems reasonable to expect that some consumers will use the information disclosed pursuant to Regulation 81.50 to select lower calorie meals when eating at covered restaurants and that these choices will lead to a lower incidence of obesity.” 4/16/08 Mem. Op. at 26. Whatever that statement means, it is certainly not a finding that the regulation “will likely” lower the incidence of obesity in New York City.

The district court quoted as a concession a statement by Dr. Allison that “it is reasonable to conjecture that providing calorie information at the point of purchase in restaurants (especially in fast food restaurants) might be beneficial in reducing obesity levels.” *Id.* at 25. However, in the very next sentence Dr. Allison said: “However, I believe it is equally reasonable to conjecture that providing calorie information at the point of purchase in restaurants (including fast food restaurants) would have no beneficial effect on reducing obesity levels.” See Milburn Decl. Exh. V at 14. The reason he said this is that after a full review of all the literature and studies, he found only conjecture and speculation -- not evidence -- that could lead to the conclusion that posting calories in the way Defendants

were mandating (as opposed to the other ways that many restaurants already provided calorie information) would affect the calorie intake even for a day or for any meaningful period. *See id.* at 15-30, 33. In addition, Dr. Allison concluded that “the evidence can equally support the conjecture that such action would be ineffective and possibly even deleterious.” *Id.* at 33. Dr. Allison’s careful analysis of the scientific evidence -- or more precisely the lack thereof -- was essentially unchallenged in the district court.

Third, Defendants do not respond to any of the serious criticisms Plaintiff made of the district court opinion. Defendants do not even attempt to answer some fundamental questions that Plaintiff raised about the district court's decision on preemption under the Nutrition Labeling and Education Act ("NLEA"), 21 U.S.C. §§ 343(r), 343-1(a)(5): why is it appropriate or permissible for the district court to ignore the FDA's definition of "claim"? Is it sensible to read a preemption statute in a way that allows states and localities to escape from its provisions by mandating actions that otherwise would be preempted by the statute? Why is it the district court's province, instead of Congress', to fill perceived "regulatory gaps"? And how could there be a "regulatory gap" here when Congress itself has provided that the FDA could permit states and localities to regulate labeling if they can make a showing that the proposed regulation "would not unduly burden interstate

commerce" and "is designed to address a particular need for information" not met by the federal scheme? *See* Pl. Mem. at 7-10.

Nor do Defendants address the fact that the standard for judging restraints on commercial speech is in a state of flux. Both defendants and the district court give virtually no weight to the rights of commercial speakers. Applying the standard in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), Defendants and the district court assume commercial speech has protections which run principally to the receivers of the information, and that the speakers' rights are minimal. *See* Def. Opp. at 5 (quoting *Zauderer*); 4/18/08 Mem. Op. at 4-5. It is not at all clear defendants and the district court are right. There is controversy surrounding what is the correct standard to apply to restraints on commercial speech. More recent Supreme Court cases establish more rigorous tests that governments must meet before restricting non-misleading and lawful commercial speech, the kind of speech at issue here. *See United States v. United Foods*, 533 U.S. 405 (2001), and *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). If the standard of either *United Foods* or *Central Hudson* applies, defendants have effectively conceded that they could not meet those tests. Therefore, plaintiff would win. Defendants cannot plausibly say there is no likelihood of success on the merit of the First Amendment claim.


## CONCLUSION

For these reasons, and the reasons stated in Plaintiff's initial motion papers, the Court should extend the stay of enforcement and issue a scheduling order expediting consideration of the appeal.

Dated: April 24, 2008

Respectfully submitted,

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