

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiff,

-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.

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**DEFENDANTS' MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFF'S MOTION FOR AN
INJUNCTION PENDING APPEAL**

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007
(212) 442-0573

Gabriel Taussig
Mark W. Muschenheim
Fay Ng

Thomas Merrill
Office of the General Counsel
New York City Department of Health
and Mental Hygiene

Of Counsel

April 17, 2008

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Defendants the New York City Board of Health ("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 memorandum of law in opposition to plaintiff's motion for an injunction pending appeal.

ARGUMENT

Yesterday this Court denied plaintiff's motion for summary judgment on its preemption claim and for a preliminary injunction on its First Amendment claim. Plaintiff now moves for essentially the same relief while it appeals this Court's decision; an injunction pending appeal pursuant to FRAP 8(a) and FRCP 62(c) that seeks to enjoin a validly enacted New York City Health Code provision, Health Code 81.50. In determining this motion, four factors are considered: "the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest."

Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002) (citation omitted). A consideration of these four factors indicates that plaintiff's motion should be denied.

First, as the Second Circuit noted, there is "some uncertainty ... as to the first factor because of the various formulations used to describe the degree of likelihood of success that must be shown." Id. (emphasis in original). Given that the plaintiff seeks to enjoin a validly enacted legal provision, it is respectfully submitted that a more rigorous showing should be made, similar to the burden a movant bears when seeking to enjoin "government action taken in the public interest pursuant to a statutory or regulatory scheme" where the movant must establish "a clear or substantial likelihood of success on the merits." Sussman v. Crawford, 488 F.3d 136, 140 (2d Cir. 2007). In any event, even if the "substantial possibility" standard relied on by plaintiff applies, plaintiff still cannot prevail on this factor. This Court's well-reasoned decision indicates that plaintiff does not raise even a substantial possibility of prevailing on appeal.

Addressing the critical flaws in plaintiff's preemption claim, yesterday this Court held:

NYSRA's position ... ignores the mandatory/voluntary architecture of § 343(q) and (r) ... as well as the obvious intent of Congress in drafting § 343-1(a)(4), which explicitly preserves state authority to impose nutrition labeling requirements on restaurants. NYSRA's reading of the statute would also create a regulatory vacuum in which neither federal nor state authorities have the power to require restaurants to disclose nutrition information to consumers.

Slip op. at 10. And addressing the plaintiff's First Amendment claim, this Court held that the proper analytical framework was, predictably, the standard set forth in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) and Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104

(2d Cir. 2001). Slip op. at 16. Applying the reasonable relationship/rational connection test set forth in those cases, this Court held:

Based on the evidence presented by the City, as well as common sense, 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.

Slip op. at 26.

Thus, the legal questions presented in this case are not as difficult as plaintiff portrays them to be. As this Court also noted in NYSRA I, 509 F. Supp. 2d at 357, because the NLEA “explicitly leaves to state and local governments the power to impose mandatory nutritional labeling,” slip op. at 2, there is not even a substantial possibility that plaintiff will prevail on its preemption claim. Similarly, because the factual disclosure mandated by Health Code 81.50 -- consistent with a long line of compelled disclosure cases -- is reasonably related to the City’s interest in reducing obesity, there is not even a substantial possibility that plaintiff will prevail on its First Amendment claim.

Second, plaintiff has not demonstrated any concrete irreparable harm, but instead relies on the principle that one who asserts a violation of the First Amendment has ipso facto suffered irreparable harm as a matter of law. As recognized by this Court in yesterday’s decision, plaintiff’s First Amendment claim is limited in that it does not involve classic expression of opinion, but rather is premised on the fact that plaintiff is merely required to disclose factual information. Moreover, even if plaintiff is correct that this claim raises First Amendment concerns, these concerns are minimal, and are outweighed by the important public health concerns that are addressed by Health Code 81.50.

Third, the City will suffer substantial injury if the City is enjoined from enforcing Health Code 81.50. As noted below in the discussion of the public interest prong, Health Code 81.50's posting requirements will further the City efforts to address the obesity epidemic. Moreover, the sooner Health Code 81.50 is implemented, the better, since delaying implementation means that many consumers will continue to remain in the dark about the number of calories they are consuming from restaurants affected by Health Code 81.50. And contrary to plaintiff's assertions that the City's actions to date indicate a disregard for the urgency of the matter, here Health Code 81.50 was adopted in late January 2008, and became effective less than two and one-half months later. After plaintiff started this action, the City did not agree to "no enforcement" stays until late March 2008; those stays were very brief, totaling slightly more than three weeks, and were entered into to enable the Court to issue its decision.¹ That the City also agreed to a six-week phase-in of enforcement during which it would conduct compliance inspections and issue violations (but not seek fines for those violations) can hardly be considered as not taking enforcement measures.

Finally, the public interest factor also weighs heavily in favor of the City. Even plaintiff concedes that the City has a substantial interest in reducing obesity, slip op. at 24, fn 15, and that it is reasonable to think that providing calorie information at the point of purchase will have such an effect. Slip op. at 25. Health Code 81.50 advances this important public interest by doing just that. Each month its implementation is delayed, another 10 million meals are served

¹ Similarly, as plaintiff notes, the City's agreement to a "no enforcement" stay of Health Code 81.50 at issue in NYSRA I was similarly done "to give the Court adequate time" to reach a decision in that action. After this Court issued its decision in September 2007, the City expeditiously began the process of enacting the Health Code provision at issue here, which included the Board of Health's determination to publish the proposal, public comments on the proposal and its adoption by the Board.

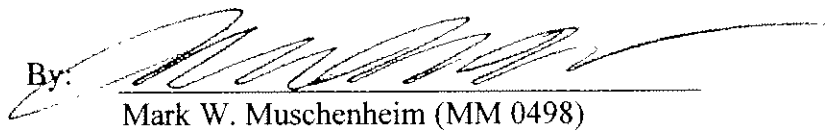
at chain restaurants in New York City without point of purchase calorie information, further worsening the obesity epidemic that is described in detail in the City's opposition papers at pages 20-27. Health Code 81.50 is an important step in the fight against obesity whose implementation should no longer be delayed.

CONCLUSION

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

Dated: New York, New York
April 17, 2008

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007
(212) 442-0573

By: 
Mark W. Muschenheim (MM 0498)

Assistant Corporation Counsel

Gabriel Taussig
Fay Ng

Thomas Merrill
Office of the General Counsel
New York City Department of Health
and Mental Hygiene

Of Counsel