UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COURTESY COPY

NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiff,

v.

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

Defendants.

No. 08 Civ. 1000 (RJH)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR CONTINUATION OF STAY OF ENFORCEMENT PENDING APPEAL

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April 16, 2008

On March 27, 2008, the Court entered an order staying enforcement of Regulation 81.50 until April 14, 2008, and preventing Defendants from seeking monetary fines for violations of Regulation 81.50 until May 27, 2008. On April 11, 2008, the Court extended this stay until April 21. Now that the Court has issued its ruling, Plaintiff respectfully requests that the Court extend that stay until appellate proceedings are complete.

ARGUMENT

Under Rule 62(c) of the Federal Rules of Civil Procedure, "[w]hile an appeal is pending from an interlocutory . . . judgment that . . . denies an injunction, the court may . . . modify . . . or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. Pro. 62(c). The standard for issuance of a stay or injunction pending appeal is: "(1) whether the movant will suffer irreparable harm absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated 'a substantial possibility, although less than likelihood, of success' on appeal, and (4) the public interests that may be affected." *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993) (citation omitted); *accord In re World Trade Center Disaster Site Litigation*, 503 F.3d 167, 170 (2d Cir. 2007).

The relationship between these factors is dynamic, with "'[t]he necessary "level" or "degree" of possibility of success . . . vary[ing] according to the court's assessment of the other . . . factors.'" *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (quoting *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

I. PLAINTIFF'S MEMBERS WOULD SUFFER IMMEDIATE AND IRREPARABLE INJURY ABSENT A FURTHER STAY OF ENFORCEMENT PENDING APPEAL

Two constitutional rights are at stake. While we recognize that the Court has ruled against Plaintiff, there can be no question that the rights at stake are themselves substantial and important ones, and their infringement constitutes irreparable harm. *See Statharos v. New York Taxi & Limousine Comm.*, 198 F.3d 317, 322 (2d Cir. 1999) (where "plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary").

"It is established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Int'l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996) (citation omitted). Similarly, enforcement of a local law that is preempted by a federal statute constitutes irreparable harm. In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992), the Court affirmed an injunction against threatened enforcement of state consumer protection laws preempted by the Airline Deregulation Act. The Court explained that parties threatened by such enforcement had no adequate remedy at law, because, absent an injunction, they were "faced with a Hobson's choice: continually violate the [preempted local] law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review." A preemption statute constitutes a "federally created right to have only one regulator" with regard to the issue at hand. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990), *aff'd in relevant part sub nom. Morales v. Trans World Airlines, Inc.*, 504 U.S. at 381. Hence, "permitting states to regulate" where Congress has preempted state regulation "would violate the Supremacy Clause, causing irreparable

injury." *Id.*; *accord VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006) (in an "an express preemption case . . . the finding with respect to likelihood of success carries with it a determination that the other three requirements, including irreparable harm, have been satisfied").

II. The City Will Not Suffer Injury During a Further Stay Pending Appeal

Continuing the stay of enforcement pending an expedited appeal will not harm Defendants. They have already voluntarily stayed enforcement since July 2007, including three voluntary stipulations so-ordered by this Court. An extension of the current stay will preserve the status quo.

Defendants cannot seriously contend that time is of the essence requiring implementation of Regulation 81.50 before its legitimacy has been considered by the courts. The Department of Health first promulgated the prior version of Regulation 81.50 on December 5, 2006, and included an effective date of July 1, 2007, seven months after passage. Later, in a website posting, the City unilaterally announced that it would provide a three-month "grace period" through October 1, 2007. After Plaintiff commenced an action to enjoin enforcement of that regulation, Defendants agreed to convert their voluntary October 1 "grace period" into a court-ordered stay of enforcement, to give the Court adequate time to evaluate the parties' legal and factual submissions on the preliminary injunction.

Following this Court's permanent injunction, the Defendants elected not to appeal. Rather, the Board of Health promulgated the revised Regulation 81.50 on January 22, 2008. This time, the regulation was not scheduled to become effective until

March 31, 2008. At oral argument before the Court, Defendants voluntarily agreed not to levy any monetary fines on Plaintiff's members for another six weeks following March 31. More recently, on April 11 Defendants agreed to another extension of the stay on April 11, which the Court so ordered staying enforcement until April 21.

The case of *Goldstein v. Miller*, 488 F. Supp. 156 (D. Md. 1980), is instructive. There, the plaintiffs challenged a federal regulation restricting the size of liquor bottles. The government agreed to postpone enforcement of the regulation during district court proceedings. The District Court upheld the regulation, and the government then refused to consent to a further stay pending appeal. Even though it had denied the preliminary injunction, the District Court stayed enforcement pending appeal. In addressing the potential injury to the government that would result from a stay of enforcement pending appeal, the court noted that the government had already agreed to postpone enforcement of the law during two months of district court proceedings: "Such postponement seemingly did not cause any irreparable injury to defendants," and thus a further postponement would not cause irreparable injury either. 488 F. Supp. at 175. The same is true here.

III. Plaintiff's Challenge Presents Serious Legal Questions

"The necessary level or degree of possibility of success" is satisfied by "a substantial possibility, although less than a likelihood, of success." *See Mohammed*, 309 F.3d at 101-02 (internal quotations omitted); *Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1985), *vacated on other grounds*, 487 U.S. 1229 (1988). As the Second Circuit has explained, "a grant of injunctive relief pending appeal does not depend solely or even primarily on a consideration of the merits." *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir.

1994). In considering a motion under Rule 62(c), a court is not asked to "predict[] that it has rendered an erroneous decision." *Washington Metropolitan Area Transit Comm'n*, 559 F.2d at 844. Such a standard would render Rule 62 motions an empty formality leading in all cases to the filing of an identical motion before the Court of Appeals. *See* Fed. R. App. Pro. 8(a)(1) (providing that "[a] party must ordinarily move first in the district court for . . . a stay of the . . . order of a district court pending appeal").

"What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Washington Metropolitan Area Transit Comm'n*, 559 F.2d at 844-45; *see also Carvel Corp. v. Eisenberg*, No. 87 Civ. 608, 1988 WL 120135, at *2 (S.D.N.Y. Oct. 31, 1998) (same, granting stay); *Empresa Cubana Del Tabaco v. Culbro Corp.*, No. 97 Civ. 8399, 2004 WL 925615, at *5 (S.D.N.Y. Apr. 30, 2004) ("Because of the novelty of the legal issues, the Court acknowledges that [the movant] has shown 'a substantial possibility, although less than a likelihood of success' on appeal."); *Miller v. Brown*, 465 F. Supp. 2d 584, 596 (E.D. Va. 2007) ("While the Court cannot say that Defendants are likely to prevail in their appeal, the Court does recognize that this case raises an issue of first impression. Because the Fourth Circuit may resolve the issue differently, Defendants have at least demonstrated a 'substantial case on the merits.'"); *Simon Property Group, Inc. v. Taubman Centers, Inc.*, 262 F. Supp. 2d 794, 798 (E.D. Mich. 2003) (holding that a party can satisfy the "likelihood of success" factor "where substantial legal questions or matters of first impression are at issue and the equities favor maintaining the status quo"); *Goldstein*, 488 F. Supp. at 175 ("[D]espite this Court's strong belief as to the correctness of its views . . .,

there is little doubt that at least some of the issues raised in these cases present serious questions of first impression. For that reason, this Court concludes that plaintiffs have met the burden imposed by the [likelihood of success] standard").

This is such a case, and the questions presented by Plaintiff raise serious issues not yet resolved in the Second Circuit. The preemptive reach of 21 U.S.C. §§ 343-1(a)(5) with regard to restaurants' nutrient claims turns on a complex set of statutory and regulatory provisions. This Court has ruled once in Plaintiff's favor and once for the Defendants on the preemptive scope of 21 U.S.C. § 343-1. Before this Court's first ruling, that preemption provision has been construed by only one other court – a district court that sided with Plaintiff's position. *Reyes v. McDonald's Corp.*, Nos. 06 C. 1604 & 06 C. 2813, 2006 WL 3253579, at *4 (N.D. Ill. Nov. 8, 2006). The manner in which §§ 343-1(a)(4) and 343-1(a)(5) relate to each other is a matter of first impression in this Circuit.

Similarly, the law underlying Plaintiff's First Amendment claim remains unsettled. This matter involves questions about the relationship between compelled speech, protected commercial speech, and government-compelled disclosures. While this Court resolved these questions against Plaintiff, the Second Circuit could reach the opposite conclusion, in effect reaffirming its earlier decision in *International Dairy*, 92 F.3d 67, 71 (2d Cir. 1996), following *Central Hudson*. Alternatively, the Circuit could follow *United States v. United Foods, Inc.*, 533 U.S. 404 (2001). Under either case, Plaintiff would prevail on the merits.

IV. CONTINUED STAY OF ENFORCEMENT PENDING APPEAL IS IN THE PUBLIC INTEREST

The public interest also favors a stay here. Serious and important constitutional freedoms are at stake. The City is admittedly "breaking new ground" with this regulatory initiative[1] and has already voluntarily postponed full enforcement of the regulation for more than a year and four months. The public interest will be served by evaluating whether the new regulation is lawful *before* subjecting Plaintiff's members to it, for there is no public interest in the enforcement of unconstitutional state laws. *Bank One v. Guttau*, 190 F.3d 844, 847-48 (8th Cir. 1999); *Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1179 (D. Col. 2001) (stating that the public interest factor are satisfied when "the injunction seeks to enforce express federal preemption"); *Pearson v. Shalala*, 130 F. Supp. 2d 105, 119 (D.D.C. 2001) (stating that it is "clearly in the public interest to ensure that governmental agencies . . . fully comply with the law, especially when that law concerns the parameters of a party's First Amendment rights to effectively communicate its health message to consumers.").

[1] *See* RAY RIVERA, *Survey Swaps MetroCards for Meal Receipts*, N.Y. TIMES, March 30, 2007, at B2.

CONCLUSION

For the reasons above, Plaintiff respectfully requests that this Court provide for a continued stay of all enforcement pending completion of any appellate proceedings, on the terms set forth in the Court's April 11, 2008 Order.

Dated: April 16, 2008
New York, New York

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK STATE RESTAURANT ASSOCIATION,

Plaintiff,

v.

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

Defendants.

No. 08 Civ. 1000 (RJH)

ORDER TO SHOW CAUSE
AND TEMPORARY CONTINUATION OF STAY

The Court having denied Plaintiff's Motion for a Preliminary Injunction, and being fully apprised of the entire record in this action, including the accompanying Memorandum of Law, dated April 16, 2008, it is hereby:

ORDERED that, good cause having been shown, Defendants New York City Board of Health, New York City Department of Health and Mental Hygiene, and Commissioner Thomas R. Frieden show cause before the Honorable Richard J. Holwell at Room ___, United States District Courthouse, 500 Pearl Street, New York, New York 10007, on the ____ day of April, 2008, at ______ a.m./p.m., or as soon thereafter as counsel may be heard, why an order should not be entered granting Plaintiff's motion for a stay pending appeal; and it is

FURTHER ORDERED that service of this Order, together with the Memorandum of Law in Support of Motion for a Stay Pending Appeal and the Declaration of Peter L. Zimroth, be made upon Defendants c/o the Law Department of the City of New York, 100 Church Street, New York, New York, by electronic mail and hand, e-mail service to be made within twelve (12) hours and by-hand service to be made within twenty-four (24) hours after this Order has been signed, shall constitute good and sufficient service of this motion upon Defendants; and

FURTHER ORDERED that any opposition papers of Defendants shall be filed and served by hand by no later than 12:00 noon on the ____ day of April, 2008; and it is

AND IT IS FURTHER ORDERED that, pending a determination of the present motion, the Court's April 14, 2008 Order is continued, and all enforcement (including, without limitation, issuing warning letters, notices of violation or violations, making statements on the New York City Department of Health's webpage or elsewhere indicating that restaurants or other entities are not in compliance with Regulation 81.50, or assessing fines or penalties) of Regulation 81.50 shall be stayed. Nothing herein shall preclude defendants from publicly expressing their opinions about plaintiff's challenge to Regulation 81.50 so long as their public statements do not indicate that restaurants or other entities are not in compliance with the regulation.

Dated: New York, New York
April ____, 2008

SO ORDERED:

____
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COURTESY COPY

NEW YORK STATE RESTAURANT ASSOCIATION, Plaintiff, - against - 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.	No. 2008 Civ. 1000 (RJH)

DECLARATION OF URGENCY OF KENT A. YALOWITZ IN SUPPORT OF STAY OF ENFORCEMENT PENDING APPEAL

Kent A. Yalowitz declares as follows:

1. I am a member of the bar of this Court and of the firm of Arnold & Porter LLP, counsel for the Plaintiff New York State Restaurant Association ("NYSRA") in the above-captioned case. I submit this declaration in support of the Plaintiff's motion, by Order to Show Cause, for a stay or injunction pending appeal enjoining Defendants from enforcing New York City Health Code section 81.50 ("Regulation 81.50").

2. Plaintiff seeks a stay or injunction pending appeal in order to prevent irreparable harm to Plaintiff's members' First Amendment rights and to avoid undue disruption to their restaurant operations. This application is brought by Order to Show Cause, rather than by Notice of Motion, because Plaintiff's ability to have meaningful appellate review of this Court's denial of a preliminary injunction will be prejudiced by delay. The loss of constitutionally protected

freedoms such as those at stake here while appealing the Court's decision is irreparable and unnecessary.

3. The Department of Health first promulgated the prior version of Regulation 81.50 ("Old Regulation 81.50") on December 5, 2006, and included an effective date of July 1, 2007. Subsequently, the City unilaterally announced a three-month "grace period" through October 1, 2007 before enforcing Old Regulation 81.50. In the litigation involving the prior regulation, Defendants voluntarily agreed to convert this "grace period" into a stay of enforcement which was so ordered by this Court.

4. On September 11, 2007, this Court issued a decision and order granting Plaintiff's motion for summary judgment and permanent injunctive relief prohibiting enforcement Old Regulation 81.50, finding that the regulation was preempted by federal law.

5. Defendant Board of Health promulgated the revised Regulation 81.50 on January 22, 2008. This regulation was due to take effect March 31, 2008. On March 27, Defendants voluntarily agreed to stay enforcement of Regulation 81.50 until April 14 and not to seek monetary fines for violation of Regulation 81.50 until May 27.

6. On April 14, Defendants agreed not to oppose Plaintiff's request to extend the stay of enforcement but deferred on whether to extend the "no fine" stay. Later that day, the Court entered an order extending the stay of enforcement until April 21 and the "no fine" stay until June 3.

7. In light of the Court's decision issued today, I spoke with counsel for Defendants to request a stipulation to continue the current stay of enforcement and the "no fine" stay while Plaintiff's appeal is heard. Counsel for Defendants could not immediately agree to either extension but will consider the matter further with his clients. I also told counsel for Defendants

that I would bring before the Court the present application for a stay of enforcement pending appeal, today by order to show cause.

8. As detailed in the record, Regulation 81.50 impacts two constitutional rights of Plaintiff's members. First, Regulation 81.50 will alter the way thousands of restaurants across the City engage in commercial speech with customers through menus and menu boards. Absent a stay or injunction pending appeal, Defendants' enforcement of Regulation 81.50 will irreparably deprive many of Plaintiffs' members of their First Amendment freedoms. The loss of constitutionally protected freedoms even for minimal time periods is irreparable.

9. Second, Regulation 81.50 subjects Plaintiff's members to another regulatory regime where, Plaintiff believes, only the federal regime should apply. The Regulation imposes significant additional burdens. Many of the restaurants covered by the Regulation have not previously published nutrition information about their menu items and must make arrangements to have each item analyzed and tested in order to determine calorie count. Restaurants that use hand held menus will have to design and print new menus. Restaurants that use menu boards will have to design, produce, distribute, and install them. Restaurants covered by Regulation 81.50 have estimated that this work will take them a minimum of six weeks to complete.

10. Unless enforcement is stayed or enjoined pending appeal, these NYSRA members face the Hobson's choice of taking these immediate steps to change their menus and menu boards to comply with a law that they believe is invalid. Moreover, these restaurants may be subject to fines during the time between the Regulation taking effect and their being in compliance.

11. No previous application for relief sought herein has been made to this or any other court.

12. For the foregoing reasons, Plaintiff is proceeding by Order to Show Cause rather than by Notice of Motion.

13. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 2008

Kent A. Yalowitz