SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 654024/2015
NATIONAL RESTAURANT
vs.
NEW YORK CITY OF DEPARTMENT OF HEALTH
SEQUENCE NUMBER : 002
OTHER

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____ , were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______
Answering Affidavits — Exhibits ______ | No(s). ______
Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

After oral argument and for reasons in briefs + on record, motion for a preliminary injunction is denied.

see attached

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Scanned to New York EF on ______

Dated: 2/24/16 ______, J.S.C.
HON. EILEEN A. RAKOWER

FEB 24 2016

1. CHECK ONE: .... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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NATIONAL RESTAURANT ASSOCIATION,

Plaintiff-Petitioner,

Index No. 654024/15

DECISION and ORDER

- against -

Mot. Seq. 2, 3

THE NEW YORK CITY DEPARTMENT OF HEALTH & MENTAL HYGIENE, THE NEW YORK CITY BOARD OF HEALTH; and DR. MARY TRAVIS BASSETT, in her Official Capacity as Commissioner of The New York City Department of Health & Mental Hygiene,

Defendants-Respondents.

---X

HON. EILEEN A. RAKOWER, J.S.C.

Oral argument was heard on February 24, 2016 on Motions Seq. 002 and 003. While the Court made a brief record at time of argument, the record is supplemented as follows.

In this Article 78 proceeding, the National Restaurant Association challenges the Board of Health's adoption of Section 81.49 of the New York City Health Code, effective December 1, 2015, which requires New York City food service establishments that are part of chains with 15 or more locations to post: (1) a salt shaker symbol (the "Icon") on a menu or menu board next to any food item or combination meal that contains 2,300 milligrams or more of sodium, and (2) the statement, "Warning: [Icon] indicates that the sodium (salt) content of this item is higher than the total daily recommended limit (2,300 mg). High sodium intake can increase blood pressure and risk of heart disease and stroke" (the "Warning Statement"). Covered establishments not in compliance with those labeling requirements are subject to $200 fines beginning on March 1, 2016.

On December 3, 2015, the National Restaurant Association ("Petitioner") filed an Article 78 and declaratory judgment petition, seeking an order and judgment enjoining the New York City Department of Health & Mental Hygiene, the New York City Board of Health, and Dr. Mary Travis Bassett (collectively, "Respondents") from implementing and enforcing Section 81.49 and declaring the rule invalid on the grounds that (1) the adoption of Section 81.49 violated principles of separation of powers; (2) Section 81.49 is arbitrary and capricious; (3) Section 81.49 violates petitioner's members' First Amendment rights; and (4) Section 81.49 is preempted by federal law—the Nutrition Labeling and Education Act. Petitioner then filed a motion for preliminary injunction by an order to show cause on December 4, 2015.

Under Article 78 of the CPLR, a party may challenge the determination of administrative agencies, public bodies or officers where "the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction" or "a determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR §§ 7803(2)–(3). Judicial review "is limited to a consideration of the statement of the factual basis for the determination and whether, in light of the agency's own standards, the findings, supported by substantial evidence, sustained the conclusions." *Montauk Imp., Inc. v. Proccacino*, 41 N.Y.2d 913, 914, 363 N.E.2d 344, 345 (1977). An administrative regulation will be upheld "if it has a rational basis, and is not unreasonable, arbitrary or capricious." *New York State Ass'n of Ctys. v. Axelrod*, 78 N.Y.2d 158, 166, 577 N.E.2d 16, 20 (1991). "The challenger must establish that a regulation is so lacking in reason for its promulgation that it is essentially arbitrary." *Id.*

To obtain a preliminary injunction, the movant must show (1) a likelihood of success on the merits, (2) a danger of irreparable harm without such relief, and (3) a balancing of equities in its favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862, 552 N.E.2d 166, 167 (1990). The movant has the burden of establishing each of those three elements by clear and convincing evidence. *Network Fin. Planning, Inc. v. Prudential-Bache Sec., Inc.*, 194 A.D.2d 651, 652, 599 N.Y.S.2d 1000 (2d Dep't 1993).

I

Petitioner contends that the Board of Health exceeded its authority in adopting Section 81.49 in violation of the separation of powers. The New York City Charter grants the Board broad authority to protect public health in the city. The Board "may embrace in the health code all matters and subjects to which the power and authority of the [Department of Health] extends." Charter § 558(c). The Department of Health is given jurisdiction to "regulate all matters affecting health in the city of New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city[.]" Charter § 556. The delegation of authority includes power to "supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health[,]" "exercise control over and supervise the abatement of nuisances affecting or likely to affect the public health[,]" "supervise and regulate the food and drug supply of the city and other businesses and activities affecting public health in the city, and ensure that such businesses and activities are conducted in a manner consistent with the public interest[.]" Charter §§ 556(c)(2) & (9).

In *Boreali*, the New York Court of Appeals articulated four "coalescing circumstances" for courts to consider when determining whether an agency has crossed the "difficult-to-define line between administrative rule-making and legislative policy-making." *Boreali v. Axelrod*, 71 N.Y.2d 1, 11 (1987); *Greater New York Taxi Ass'n v. New York City Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 610, 36 N.E.3d 632, 638 (2015) (describing the *Boreali* factors as "non-mandatory, somewhat-intertwined factors" to consider in determining whether an agency has crossed the "hazy" line between rule-making and policy-making). The four factors, which, taken together, may indicate that an agency has usurped legislative authority, are (1) whether the agency engaged in impermissible policy-making; (2) whether the agency adopted the regulation without the benefit of legislative guidance on a "clean slate"; (3) whether the agency acted in an area of legislative debate and inaction; and (4) whether the agency relied on its special expertise in developing the regulation. In *Statewide Coalition*, the Court clarified that the four considerations are not "criteria that should be rigidly applied in every case in which an agency is accused of crossing the line into legislative territory." *New York Statewide Coal. of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene*, 23 N.Y.3d 681, 696–97, 16 N.E.3d 538, 546 (2014). Justice Abdus–Salaam emphasized that the decision does not "establish any rigid decisional framework to be applied mechanically to other actions undertaken by the Board[,]" and does not "signal any significant departure from existing precedent regarding administrative law in general or the scope of the Board's authority in particular." *Id.* at 702 (Abdus–Salaam, J., concurring).

Statewide Coalition is instructive in applying the *Boreali* factors in this case. Although the Court ultimately held that the Board had "engaged in law-making beyond its regulatory authority" in promulgating the "Sugary Drinks Portion Cap Rule" (colloquially, the "Soda Ban"), the Court indicated that "policy-making would likely not be implicated in situations where the Board regulates by means of posted warnings (e.g. calorie content on menus)." *Statewide Coalition*, 23 N.Y.3d at 699. "In such cases, it could be argued that personal autonomy issues related to the regulation are non-existent and the economic costs either minimal or clearly outweighed by the benefits to society, so that no policy-making in the *Boreali* sense is involved." *Id.*

Unlike the Soda Ban, which constituted a prohibition on the sale of large containers of sugary beverages, Section 81.49 does not prohibit the sale of food containing high levels of sodium. Indeed, covered establishments may continue to add *any* amount of sodium to their food. Nor does Section 81.49 prevent customers from being served and consuming sodium-rich food in any quantity that they choose. Rather, the rule simply requires covered establishments to post a warning label, informing customers when the sodium content of a menu item exceeds the recommended *daily* upper limit under the established federal dietary guidelines. A warning label that provides consumers with critical information in making personal dietary choices that may affect their health does not "interfere[] with commonplace daily activities preferred by large numbers of people," and thus does not raise the "complex value judgments concerning personal autonomy and economics" that were found significant in *Statewide Coalition. Id.* at 699. Personal autonomy is not hindered, but rather encouraged by providing information so that consumers can make informed decisions about health; said differently, information *promotes* autonomy, giving a consumer the opportunity to make choices appropriate to himself or herself individually.

With respect to the second *Boreali* factor, the Board did not adopt Section 81.49 on a "clean slate" because the rule fits squarely within the Board's authority to regulate public health. The Board has used that authority to set forth nutrition and physical activity requirements for group day care facilities (Health Code § 47.61), restrict the use of artificial trans fats (Health Code § 81.08), and require the posting of calorie information by chain restaurants (Health Code § 81.50). Enabling legislation "need not be detailed or precise as to the agency's role." *Greater New York Taxi Ass'n*, 25 N.Y.3d at 609. "An agency can adopt regulations that go beyond the text of its enabling legislation, provided they are not inconsistent with the statutory language or its underlying purposes." *Id.* at 608 (citing *Matter of Gen. Elec. Capital Corp. v. New York State Div. of Tax Appeals*, 2 N.Y.3d 249, 254, 810 N.E.2d 864 (2004)).

In contrast to the Soda Ban, by adopting Section 81.49, the Board did not devise a new rule that "significantly changes" the manner in which menu items containing sodium are provided to customers at eating establishments. *Statewide*

Coalition, 23 N.Y.3d at 700. It is within the Board's regulatory authority to require the posting of information and warning labels concerning health risks.

As evidence that the Board improperly intruded upon an area of legislative debate, the Petitioner cites to four bills that relate to sodium. Each of those bills, however, was introduced by one legislator and received no further consideration. *See NYC C.L.A.S.H., Inc. v. New York State Office of Parks, Recreation & Historic Pres.*, 125 A.D.3d 105, 111, 2 N.Y.S.3d 231 (N.Y. App. Div. 2014) *leave to appeal denied sub nom. NYC C.L.A.S.H., Inc. v. New York State Office of Parks*, 25 N.Y.3d 963, 30 N.E.3d 903 (2015) (finding evidence of several "failed bills" insufficient to warrant the conclusion that the agency had exceeded its authority). Moreover, none of the bills addressed sodium warning labels in restaurants. In developing Section 81.49, the Board relied on its public health expertise in regulating restaurants. It considered evidence that chain restaurants accounted for a large percentage of all restaurant meals and that a significant percentage of those meals contained levels of sodium that exceeded the federal daily recommended limit. The Board also relied on its expertise in weighing the scientific evidence concerning the risks associated with excess sodium consumption. Therefore, to the extent that the third and fourth *Boreali* factors are relevant, both factors favor a determination that the Board acted within its authority.

Applying the *Boreali* factors, in light of the additional guidance provided in *Statewide Coalition*, this court finds that the Board did not act outside the bounds of its authority in the area of public health by adopting a rule requiring chain restaurants to post sodium warning labels.

II

Petitioner further argues that, even if Respondents had authority to adopt Section 81.49, the rule is "arbitrary and capricious" under section 7803(3) of the CPLR. This court's review of the Board's decision to adopt Section 81.49 is limited under the arbitrary and capricious standard. A reviewing court looks to the record to determine whether there is a "rational basis to support the findings upon which the agency's determination is predicated," but the court "may not substitute its own judgment of the evidence for that of the administrative agency." *Purdy v. Kreisberg*, 47 N.Y.2d 354, 358 (1979).

Here, the record includes the Board's original proposal, the comments made at the public hearing, the additional comments submitted to the Department of Health, the Department of Health's responses to those comments, and the notice of adoption. The Board acted to address health risks associated with sodium intake, including cardiovascular disease, the leading cause of death in New York City. It found that nearly 30 percent of adults in New York City had been diagnosed with high blood pressure. The Board considered evidence establishing a link between sodium intake and high blood pressure, and recognized that the daily upper limit recommended by the federal government in the 2010 Dietary Guidelines for Americans is 2,300 milligrams of sodium. It determined that the average daily sodium intake among New Yorkers was more than 3,200 milligrams. The Board also considered evidence that restaurant food plays a significant role in sodium intake and that adult meals at chain restaurants contain an average of 3,512 milligrams of sodium. The Board's decision to require chain restaurants with 15 or more locations to post the sodium warning label, which parallels the application of the calorie disclosure rule, is rational based on the Board's determination that the requirement is not unduly burdensome for chain restaurants because they have uniformity in their menu items and food preparation.

Section 81.49 simply warns consumers about menu items that contain more sodium than the federal daily recommended upper limit. Such information empowers consumers by making them aware of health risks associated with sodium consumption and enabling them to make choices for themselves with that in mind. Viewed as a whole, the record demonstrates that the Board's decision to promulgate Section 81.49 had a rational basis and was neither arbitrary and capricious nor unreasonable.

III

Petitioner argues that Section 81.49 infringes on its members' First Amendment rights. Commercial speech is entitled to First Amendment protection. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Section 81.49 is commercial speech because it proposes a commercial transaction—that is, it requires a sodium warning label in connection with the sale of restaurant food. *See New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 131 (2d Cir. 2009) (applying the *Zauderer* standard and holding that the Board of Health's calorie disclosure rule did not violate the First Amendment rights of the NYSRA's members). Like the calorie disclosure rule, Section 81.49 provides consumers with factual information in a commercial context. Therefore, *Zauderer*'s "reasonableness" standard applies.

As discussed above, the Board has demonstrated a reasonable relationship between the purpose of Section 81.49—to increase consumer awareness of the health risks of sodium consumption and reduce cardiovascular disease—and the means employed to achieve that purpose—a warning label that alerts consumers when a menu item exceeds the federal daily recommended limit of sodium. *See NYSRA*, 556 F.3d at 131; *see also Nat'l Elec. Mfr. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) *cert. denied*, 536 U.S. 905 (2002) ("[M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests."). Section 81.49 provides consumers with valuable information in making dietary and health-related decisions when eating out in chain restaurants. By contrast, petitioner's members' interest in *not* disclosing that a menu item contains more sodium than the federal daily recommended upper limit is minimal.

Because the Board has a legitimate interest in promoting public awareness of the health risks associated with high sodium consumption, and the text of the required warning statement is factual and uncontroversial, this court concludes that Section 81.49 does not violate the First Amendment.

IV

Finally, Petitioner argues that Section 81.49 is preempted by the Nutrition Labeling and Education Act ("NLEA"). Pub. L. 101–535, 104 Stat. 2353 (1990). Respondents contend that Section 81.49 is not preempted because it falls within an exception to the express preemption provision.

The NLEA provides direct guidance on preemption. It states that "[the NLEA] shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343–1(a)]." Pub. L. No. 101–535, § 6(c)(1), 104 Stat. 2353, 2364 (21 U.S.C. § 343–1 note); *New York State Rest. Ass'n*, 556 F.3d at 123 (noting that, helpfully, the NLEA is "clear on preemption"). The NLEA further provides that its express preemption provision "shall not be construed to apply to *any* requirement respecting a statement in the labeling of food that provides for a *warning* concerning the *safety* of the food or component of the food." Pub. L. No. 101–535, § 6(c)(2) (21 U.S.C. § 343–1 note) (emphasis added). In amending the NLEA in 2010, Congress retained that exemption, permitting states and localities to require warnings concerning the safety of food. Pub. L. No. 111–148 § 4205(d)(2), 124 Stat. 119, 576; *see also Sciortino v. Pepsico, Inc.*, 108 F.Supp.3d 780, 801 (N.D. Cal. 2015) ("[T]he NLEA carves out an exemption from its express preemption clause where *warnings* concerning the *safety* of food or component of food are at issue.").

Section 81.49 falls within the plain language of the NLEA's warning exception to express preemption. The regulation requires a warning label (the salt shaker icon and the word "warning") concerning the safety (the warning statement that "high sodium intake can increase blood pressure and risk of heart disease and stroke") about a component of food (the sodium content of the menu item).

V

For the foregoing reasons, the Court concludes that (1) the Board properly exercised its broad authority in the area of public health by adopting Section 81.49; (2) Section 81.49 is not invalid as arbitrary and capricious; (3) Section 81.49 does not violate the First Amendment rights of Petitioners' members because it reasonably requires disclosure of factual information in a purely commercial context; and (4) Section 81.49 is not preempted by federal law because it requires a "warning" statement and thus falls within a valid exception to the express preemption provisions of the NLEA. Accordingly, Petitioner has not demonstrated a likelihood of success on the merits and Petitioner's motion for preliminary injunction is denied.

Wherefore, it is hereby,

ORDERED that Petitioner's Article 78 and declaratory judgment petition is denied; and it is further

ORDERED that Petitioner's motion for preliminary injunction is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: FEBRUARY 26, 2016

FEB 26 2016

EILEEN A. RAKOWER, J.S.C.