SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

--x	Index #:
NYC C.L.A.S.H., INC. and RUSSELL WISHTART, Individually,	
	SUMMONS
Plaintiffs,	
-against-	Plaintiffs designate New York County as the place of trial
CITY OF NEW YORK and THE NEW YORK CITY COUNCIL,	The basis of venue is that the cause of action arose in New York County [C.P.L.R. § 504(c)]
Defendants.	
--x	

To the above named Defendant(s)

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

DATED: New York, NY
March 25, 2014

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TO:

City of New York
Defendant
100 Church Street
New York, NY 10007

The New York City Council
Defendant
100 Church Street
New York, NY 10007

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--x Index #:
NYC C.L.A.S.H., INC. and RUSSELL WISHTART, Individually,

Plaintiffs,

-against-

COMPLAINT FOR DECLARATORY JUDGMENT

CITY OF NEW YORK and THE NEW YORK CITY COUNCIL,

Defendants.
--x

Plaintiffs, NYC C.LA.S.H., INC. ("CLASH") and RUSSELL WISHTART ("Wishtart"), by way of Complaint for Declaratory Judgment against Defendants, CITY OF NEW YORK (the "City") and THE NEW YORK CITY COUNCIL (the "Council"), allege as follows:

INTRODUCTION

1. This is an action for declaratory judgment pursuant to New York Civil Practice Law and Rules ("CPLR") § 3001 to obtain a judicial declaration:

(a) That Local Law 152, Titled: "A Local Law to amend the administrative code of the City of New York, in relation to the regulation of electronic cigarettes" (Local Law 152), which amends New York City Administrative Code (cited as "N.Y.C. Admin. Code") Title 17, Chapter 5 §§ 17-501 to 17-514 ("Chapter 5"), is unconstitutional, *ultra vires*, and null and void, in that Local Law 152 adds a second subject (electronic cigarettes) to Chapter 5 and therefore violates the "One Subject Rule" contained in the New York State Constitution, Article III, § 15, the New York Municipal Home Rule Law, Article 3, § 20(3), and the New York City Charter, ch. 2, § 32;

(b) That Local Law 152 may not be implemented and is unenforceable on the basis that Local Law 152 is unconstitutional, *ultra vires*, and null and void, in that Local Law 152 violates the "One Subject Rule";

(c) Permanently enjoining and restraining Defendants from implementing and enforcing Local Law 152.

2. As set forth herein, Defendants, in adopting Local Law 152, have exceeded their legislative powers, thereby misleading the public and causing ongoing harm to New York State residents who use electronic cigarettes (hereinafter referred to singularly as "E-Cig" and plurally as "E-Cigs") in public places in New York City, including Plaintiff CLASH and its members, and Plaintiff Wishtart and others similarly situated.

JURISDICTION, FORM OF ACTION & VENUE

3. CPLR § 3001 provides: "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." This Court has jurisdiction pursuant to CPLR § 3001 to render a declaratory judgment regarding the unlawful enactment, implementation and enforcement of an unconstitutional local law, to wit: Local Law 152.

4. A declaratory judgment action is an appropriate avenue of relief where a Plaintiff seeks a determination as to the constitutionality and legality of legislative enactments, including local laws. *See*, Dun & Bradstreet, Inc. v. New York, 276 N.Y. 198, 206 [1937]. In this case, Plaintiffs seek a determination as to the constitutionality and legality of legislation enacted by the Council, to wit: Local Law 152.

5. Venue is proper in New York County pursuant to CPLR §504 because this action is against the City and the Council, Plaintiff Wishtart resides in New York County, and the events giving rise to this case (the enactment of Local Law 152) occurred in New York County.

PARTIES

6. Plaintiff CLASH (NYC C.L.A.S.H. is an acronym for "New York City Citizens Lobbying Against Smoker Harassment") is a domestic business corporation headquartered in Kings County, State of New York, and operating as a non-profit smokers' rights organization dedicated to advancing and promoting the interests of smokers and protecting the legal rights of smokers since 2002. Recently, CLASH has also dedicated itself to advancing and promoting the interests of E-Cig users and protecting their legal rights, as reflected on CLASH's website at: http://www.nycclash.com/, and as demonstrated by CLASH's efforts in opposition to Local Law 152. A copy of the testimony of Audrey Silk, founder of CLASH, at a Hearing before the Council's Committee on Health (the "Committee") on December 4, 2013 is attached hereto as Exhibit "**A**".

7. CLASH has nine hundred fourteen (914) members, many of whom are E-Cig users, over 90% of whom are smokers, and over 60% of who reside in New York State.

8. Some of CLASH's members are E-Cig users (known as "vapers") and will be unable to engage in "vaping" (use of E-Cigs) in public locations in New York City due to the enactment of Local Law 152. Some of CLASH's members also use E-Cigs to help them quit smoking.

9. Plaintiff Wishtart is a natural person and a resident of New York County, is a vaper and vaping advocate who has fought bans on use and sale of E-Cigs throughout the United States, has written a number of articles on the subjects of vaping and E-Cigs, is the host of a weekly Internet-based radio program on "Click, Bang! Radio" dedicated to vaping and E-Cigs, and organizes a monthly meeting for a New York-area vapers' group.

10. Defendant City is a municipality existing pursuant to the laws of the State of New York and the New York City Charter.

11. Defendant Council is the legislative body for the City and is subject to the New

York State Constitution, the New York Municipal Home Rule Law and the New York City Charter.

APPLICABLE LAW

New York's "One Subject Rule"

12. The New York State Constitution, Article III, § 15 provides:

> "§15. No private or local bill, which may be enacted by the legislature, shall embrace more than one subject, and that shall be expressed in the title." (The "One Subject Rule"). A copy of Article III, § 15 excerpted from the State Constitution and obtained from the New York Department of State website is attached hereto as Exhibit "**B**".

13. The New York Municipal Home Rule Law (the "MHR"), Article 3, § 20(3), codifies the One Subject Rule:

> "3. Every such local law shall embrace only one subject. The title shall briefly refer to the subject matter." A copy of MHR Article 3, § 20(3), highlighted in yellow and obtained from the New York State Legislature website, is attached hereto as Exhibit "**C**".

14. The New York City Charter, ch. 2, § 32, also contains the One Subject Rule vis-à-vis the Council:

> "§ 32. Local laws. Except as otherwise provided by law, all legislative action by the Council shall be by local law. The style of local law shall be "Be it enacted by the Council as follows." Every local law shall embrace only one subject. The title shall briefly refer to the subject-matter." A copy of New York City Charter, ch. 2, § 32, highlighted in yellow on pp. 3-4 of the Exhibit excerpt (marked as pp. 22-23 in original) and accompanied by the Charter cover page and the Chapter 2 introductory page, is attached hereto as Exhibit "**D**".

15. All three iterations of the One Subject Rule impose the same procedural limitation on local legislatures: local laws are limited to one subject, and the subject must be in the title of the law.

16. In Economic Power & Constr. Co. v. City of Buffalo, 195 N.Y. 292 [1909], the New York Court of Appeals examined the purpose and history of the One Subject Rule:

"The provision of the Constitution was adopted to check and prevent certain evils of legislation, and should be enforced by courts whenever it has been substantially violated. Its object was twofold. *First*, to prevent a combination of measures in local bills and secure their enactage by a union of interests commonly known as "log-rolling." *Second*, to require an announcement of the subject of every such bill to prevent the fraudulent insertion of provisions upon subjects foreign to that indicated in the title. Economic Power & Const. Co., 195 N.Y. at 296. (Italics in Original).

The Court of Appeals continued its examination of the One Subject Rule, observing:

"It was intended that every local subject should stand upon its own merits, and that the title of each bill should indicate the subject of its provisions, so that neither the legislature nor the public would be deceived. The title must be such at least as fairly to suggest or give a clue to the subject dealt with in the act, and unless it comes up to that standard it falls below the constitutional requirement." Id. A copy of Economic Power & Const. Co. is attached hereto as Exhibit "**E**".

FACTUAL BACKGROUND

I. The Council Enacts the "Clean Indoor Air Act" of 1988

17. In 1988, the Council enacted the Local Law 2 – the Clean Indoor Air Act (the "CIAA"), which created a new Chapter 5 of Title 17 of the N.Y.C. Admin. Code (Title 17 contains various chapters related to "Health"). Chapter 5, the CIAA, contained the newly created §§ 17-501 to 17-514 (hereinafter collectively referred to as "Chapter 5", most of which were effective April 6, 1988. Together, the fourteen sections of Chapter 5, the CIAA, constituted a single local law, subject to the requirements of the One Subject Rule. Save for §17-501, the title section, the thirteen other sections of Chapter 5 were preceded by a bold-faced "**Historical Note**" stating "Section added L.L. 2/1988 § 2," confirming that the fourteen sections of the CIAA, taken as a whole, in fact comprised but a single local law. *See generally*, the CIAA. A copy of the CIAA is attached hereto as Exhibit "**F**".

18. The title of the CIAA read as follows:

> §17-501 **Short title**. This chapter shall be known and may be cited as the "Clean Indoor Act." Exhibit "**F**" at p. 1.

19. In the "Legislative findings" section (contained in a footnote in small print beneath the title), the Council made clear the purpose of the CIAA:

> "The City Council hereby finds that the regulation and control of smoking in enclosed public places is a matter of vital concern, affecting the public health, safety and welfare all New Yorkers. There is increasing evidence that passive exposure to cigarette smoke (second-hand smoke) is linked to a variety of negative health consequences in humans . . . . " Exhibit "**F**" at p. 1 (footnote).

The Council continued:

> Given the current state of scientific evidence on the adverse health effects of second-hand smoke, the Council, in enacting this chapter, seeks to accomplish two goals: (1) to protect the public health and welfare by prohibiting smoking in certain public places except in designated smoking areas and by regulating smoking in the workplace; and (2) to strike a reasonable balance between persons who smoke and nonsmokers to breath smoke-free air. Exhibit "**F**" at p.1 (footnote).

20. §17-503 stated the extent of the CIAA's smoking prohibitions:

> §17-503 **Prohibition of smoking in public places**. a. Smoking is prohibited in all enclosed areas within public places during the times in which the public is invited or permitted . . . ." Exhibit "**F**" at p. 4.

21. The list of places subject to the smoking prohibition included transportation facilities and mass transportation; restrooms; retail stores; certain restaurants under specified circumstances; business establishments employing more than 15 people (subject to certain exceptions); libraries, museums and galleries; schools, sports arenas, theaters and convention halls excluding certain designated smoking areas; meeting places; health care facilities; and elevators. Exhibit "**F**" at pp. 4-8. Smoking in places of employment was further regulated by §17-504. *See generally*, Exhibit "**F**" at pp. 8-10.

22. As plainly evidenced by the CIAA's title, legislative findings and the specific prohibitions contained in §17-503, the one and only subject of the CIAA was protection of the public from the harmful effects of second-hand smoke exposure" [second-hand smoke is also commonly referred to as "environmental tobacco smoke" or "ETS"].

II. The Council Amends the CIAA: Enactment of the "Smoke-Free Air Act" of 1995

23. On January 10, 1995, then-City Mayor Rudolph Giuliani signed into law the Smoke-Free Air Act of 1995 (the "SFAA"), Local Law 5, which amended the fourteen sections of Chapter 5 and thus superseded the CIAA. The SFAA (Local Law 5), which became effective on April 10, 1995, was, like its predecessor the CIAA, a single local law comprised of fourteen (amended) sections. Thus, Chapter 5, although styled as the SFAA rather than as the CIAA following the enactment of Local Law 5, remained but a single local law. A copy of Local Law 5 obtained from web.archive.org (with page numbering added for ease of reference) is attached hereto as Exhibit "**G**".

24. Whereas the CIAA ostensibly sought to strike a balance between smokers and non-smokers, the SFAA tightened still further the smoking prohibitions contained in the CIAA, subject to certain exceptions.

25. The title of the SFAA, the amended Chapter 5, read as follows, with "Smoke-Free Air Act" replacing "Clean Indoor Air Act":

> §17-501 **Short title**. This chapter shall be known and may be cited as the ["Clean Indoor Air Act"] "Smoke-Free Air Act." *See*, Exhibit "**G**" at p. 2.

26. § 17-503 remained unchanged:

> §17-503 **Prohibition of smoking**. a. Smoking is prohibited in all enclosed areas within public places except as otherwise restricted in accordance with the provisions below. Exhibit "**G**" at p. 4.

27. In Local Law 5's "declaration of legislative findings and intent," the Council declared, *inter alia*:

> According to the United States Environmental Protection Agency ("EPA"), the health risks attributable to environmental tobacco smoke ("ETS")(also known as second-hand smoke, passive smoke or involuntary smoke) are well established . . . . It is the Council's

> intention that these additional restrictions will help protect children and nonsmoking adults from the health hazards presented by exposure to ETS." Exhibit "**G**" at pp. 1-2.

28. As plainly evidenced by the SFAA's amended title, unchanged statement of prohibition contained in §17-503, and the declaration of legislative findings and intent, the one and only subject of Chapter 5 following the SFAA Local Law 5 amendments remained protection of the public from the harmful effects of second-hand smoke exposure.

II. The Council Amends Chapter 5 Twice More: Enactment of the Smoke-Free Air Act of 2002 (Local Law 47) and Enactment of 2011 Local Law 11

29. In or about August, 2002, immediately following an August 12, 2002 announcement by then-City Mayor Michael Bloomberg ("Mayor Bloomberg") of his intent to expand the SFAA, the New York City Department of Health and Mental Hygiene (the "Health Department") released a public bulletin entitled "Answers to Common Objections to Smoke-Free Workplace Laws." The bulletin, which remains posted on the Health Department's website, stated:

> **Why does New York City need a new smoke-free workplace law**? . . . New York City's current smoke-free air workplace law assures that some, but not all, employees are safe from the harmful chemicals that cause cancer and heart disease in second-hand smoke. A new law is needed to extend this protection to *all* workers." [Emphasis in original] Bulletin at p.1. A copy of the bulletin is attached hereto as Exhibit "**H**" and is also available at http://www.nyc.gov/html/doh//downloads/pdf/smoke/shsmoke5.pdf.

30. On October 10, 2002, the Council's Committee on Health (the "Health Committee") held a hearing (the "October 2002 Hearing") on a proposed bill, Intro 256, to amend the SFAA. (Copies of quoted excerpts of testimony from the October 2002 Hearing are collectively attached hereto as Exhibit "**I**" with quoted portions highlighted in yellow).

31. At the October 2002 Hearing, Mayor Bloomberg testified in support of Intro 256. Mayor Bloomberg, articulating that the purpose, indeed the subject of the bill, was protection of the public from the harmful effects of second-hand smoke exposure, testified:

"Enacting this bill, Intro 256, will not outlaw the right of an individual to smoke and put his or her own life in jeopardy. If someone wants to inhale smoke, directly or indirectly, that's their right. But Intro 256 will protect thousands and thousands of New Yorkers from *involuntary exposure* to the arsenic, formaldehyde and other deadly chemicals present in *smoke-filled rooms*. Intro 256 will ensure that no *worker* in our City will ever have to risk contracting cancer, or heart disease, or lung disease, from *exposure to others' smoke*, just to hold a job." [Emphasis added]. (Exhibit "**I**" at p. 15, lines 3 - 14).

Mayor Bloomberg continued:

"Intro. 256 is our opportunity to free thousands of workers in our City from such hazardous conditions. It should be seen as the just and logical extension of protections against *secondhand smoke* that already are in place in most public settings." [Emphasis added]. (Exhibit "**I**" at p. 20, lines 16-22).

When one person smoking *causes another* significant risk of disease and death, government must act. [Emphasis added]. (Exhibit "**I**" at p. 25, lines 23-25).

"I believe you will make New York City a national leader in ending the workplace hazards of *secondplace smoke*." [Emphasis added]. (Exhibit "**I**" at p. 26, lines 20-22).

"This bill, however, is not designed to stop you from smoking. If you want to smoke, that's your right, and I will defend that. I don't think it's an intelligent, if that's the one you would make. The statistics are clear, you're hurting yourself very badly. But you don't have the right to *hurt others*." [Emphasis added]. (Exhibit "**I**" at p. 47, lines 13-19).

32. Then-City Health Commissioner Dr. Thomas Frieden ("Commissioner Frieden") also testified in support of Intro 256 as a bill designed to protect the public from ETS exposure:

"You have an opportunity to enact legislation that can similarly serve as a national model for worker protection, protection from deadly *secondhand smoke* . . . ." [Emphasis added]. (Exhibit "**I**" at p. 29, lines 7-10).

33. On December 13, 2002, the Health Committee held another hearing (the "December 2002 Hearing") on Intro 256. (Copies of quoted excerpts of testimony from the December 2002 Hearing are collectively attached hereto as Exhibit "**J**" with quoted portions highlighted in yellow).

34. Frieden again offered testimony that made clear the purpose and subject of the bill:

"The current legislation is somewhat complex, but the concept is simple – no New York City worker will have to risk cancer, heart disease or lung disease from *secondhand smoke* just to hold a job." [Emphasis added]. (Exhibit "**J**" at p. 22, lines 7-11).

35. Health Committee Chair and Councilwoman Christine Quinn echoed Frieden and Mayor Bloomberg:

> "Since this bill is sought to protect employees from *secondhand smoke*, we did research on private clubs." (Exhibit "**J**" at p. 12, lines 2-4).

36. Then-deputy mayor for economic development Daniel L. Doctoroff testified in accordance with Mayor Bloomberg, Commissioner Frieden and Councilwoman Quinn:

> "Remember, the *prime objective* of this legislation is to protect workers and their safety by creating a healthy *smoke-free environment*." [Emphasis added]. (Exhibit "**J**" at p. 16, lines 16-18).

37. On December 18, 2002, the Council enacted the Intro 256 as Local Law 47, the "Smoke Free Air Act of 2002" (File # Int 0256-2002, Enactment #: 2002/047, Title: "A Local Law to amend the administrative code of the City of New York, in relation to the prohibition of smoking in public places and places of employment"). A copy of the Local Law 47 Legislation Details (With Text) obtained from the Council's website is attached hereto as Exhibit "**K**". A copy of Chapter 5 (the SFAA) as amended by Local Law 47, is attached hereto as Exhibit "**L**".

38. The title of the SFAA, Chapter 5 as amended by Local Law 47, remained:

> §17-501 **Short title**. This chapter shall be known and may be cited as the "Smoke-Free Air Act." *See*, Exhibit "**L**" at p. 1.

39. Additionally, §17-503 remained unchanged following the Local Law 47 amendment:

> §17-503 **Prohibition of smoking**. a. Smoking is prohibited in all enclosed areas within public places except as otherwise restricted in accordance with the provisions below. Exhibit "**L**" at p. 9.

40. Local Law 47 added additional smoking prohibitions to those already contained in the 1995 SFAA, but as evidenced by the unchanged §§17-501 and 17-503, and by Mayor Bloomberg's comments, Local Law 47 did not change the subject of Chapter 5, that being <u>protection of the public from the harmful effects of second-hand smoke exposure</u>, and Chapter 5

remained as a single local law.

41. The SFAA was amended again in 2011 with the enactment of Local Law 11 (File # Int 0332-2010, Enactment #: 2011/011, Title: "A Local Law to amend the administrative code of the City of New York, in relation to prohibiting smoking in pedestrian plazas and public parks and to repeal subdivision b of section 17-513 of the administrative code of the city of New York, in relation to requiring a study regarding the prevention of second-hand smoke circulation in restaurants"). Local Law 11 did not amend Chapter 5 other than as suggested by the title. A copy of the Local Law 11 Legislation Details (With Text) obtained from the Council's website is attached hereto as Exhibit "**M**".

III. CLASH's Challenge to the Smoke-Free Air Act

42. In 2003, CLASH challenged the SFAA and the then-recently enacted New York State Clean Indoor Act on various constitutional grounds (none of which are raised in this lawsuit to challenging Local Law 152) in a lawsuit in the Southern District of New York. Although CLASH's challenge was dismissed on summary judgment, Hon. Victor Marrero, U.S.D.J. clearly found that the SFAA was <u>protection of the public from the harmful effects of second-hand smoke exposure</u> (*CLASH v. City of New York*, et al., 03 Civ. 5463 [quoted excerpts from Decision & Order dated April 7, 2004], a copy of which is attached hereto as Exhibit "**N**" with quoted portions highlighted in yellow).

> "To the contrary, as discussed in greater detail below, the Smoking Bans serve to protect an important governmental interest -- *the health and welfare of persons exposed to ETS* in New York State." [Emphasis added]. 03 Civ. 5463 at 43. Exhibit "**N**".
>
> "With regard to Local Law 47, the record illustrates that the New York City Council also considered the *mounting evidence against ETS as a basis for its enactment*." [Emphasis added]. 03 Civ. 5463 at 62. Exhibit "**N**".
>
> "As this passage discusses, *Local Law 47 was enacted as a measure to further protect New Yorkers in response to the evidence that ETS exposure* poses serious health effects."

[Emphasis added]. 03 Civ. 5463 at 63. Exhibit "**N**". [referring to testimony of Commissioner Frieden, *see* page 62].

"New York State's and New York City's stated basis for enacting the Smoking Bans **--** *protecting its citizenry from the well-documented harmful effects of ETS* -- provides a sufficient rational basis to withstand CLASH's constitutional challenges." [Emphasis added]. 03 Civ. 5463 at 65. Exhibit "**N**".

IV. The Council Enacts Local Law 152, the E-Cig Prohibition

43. On December 4, 2013 the Health Committee held a hearing (the "December 2013 Hearing") on the Pre-Considered Introduction version of a Local Law (the "E-Cig Bill" - later enacted as Local Law 152) to amend Chapter 5 to regulate and prohibit E-Cig use in public areas where smoking was already prohibited pursuant to the SFAA.

44. At the December 2013 Hearing, Audrey Silk ("Silk"), founder and chairperson of CLASH, testified on behalf of CLASH in opposition to the E-Cig Bill. See, Exhibit "**A**".

45. Earlier in the December 2013 Hearing, Councilman Vincent J. Gentile ("Gentile") adroitly identified that E-Cigs and second-hand smoke exposure are two entirely different subjects during a quasi-cross-examination of then-City Health Commissioner Thomas A. Farley ("Commissioner Farley"), who conceded that E-Cigs would be defined "separately" and further conceded that he actually didn't know what is in E-Cig vapor:

"GENTILE: I'm just wondering if we're here today based on . . . your testimony trying to fit a square peg into a round hole. Based on the definition that we have for the Smoke-Free Air Act. And the fact that the Smoke-Free Air Act addressed the issue of secondhand smoke. And as you said in your testimony who [sic] has been pointed out in . . . the presentation is there is no traditional secondhand smoke with . . . e-cigarettes. So are you suggesting that we redefine the . . . Smoke-Free Air Act because the . . . basic definition was to protect secondhand smoke.
FARLEY: No, it's the . . . way that the bill is written as you noticed that electronic cigarettes are listed separately. And the reason for us supporting this is as I put in my testimony that while we don't really know what's . . . in the vapor there . . ."

A copy of the Gentile/Farley testimony excerpted from the "Transcript of the Minutes of the Committee on Health dated December 4, 2013" is attached hereto as Exhibit "**O**"

with quoted portions highlighted in yellow. *See*, Exhibit "**O**" pp. 24-25

The exchange continued with Commissioner Farley unable (or unwilling) to provide a direct or responsive answer to Gentile's piercing question:

> "GENTILE: So it [the Bill] really has nothing to do with keeping the air smoke free? FARLEY: I….didn't say that. I would say we don't know what is in these [E-Cigs] because they change all the time and there's no reporting what's in there . . . . I don't think that's the primary reason but I cannot guarantee that it's safe." Exhibit "**O**" p. 26.

Commissioner Farley later stated, in another evasive response to another inquiry by Gentile: ". . . the primary reason why we are supportive of this bill is not the exposure to the people's secondhand [ETS]." Exhibit "**O**" p. 27.

46. This was not the first time that Commissioner Farley offered testimony that belies Defendants' violation of the One Subject Rule. On May 2, 2013, Commissioner Farley testified before the Health Committee. In response to a question about proposed legislation relating to permits for hookah establishments, Commissioner Farley stated:

> "There are hookah bars. Those are places where people smoke through a water pipe a product that is presented as not having tobacco in it, and the way that the current law is written if you are smoking something that doesn't have tobacco in it, ***then the smoke free air act doesn't apply***." [Emphasis added]. (Testimony of Commissioner Farley, May 2, 2013 at pp. 65-66. Quoted excerpt from Commissioner Farley's May 2, 2013 testimony is attached hereto as Exhibit "**P**" with quoted portions highlighted in yellow).

47. At around the time of the December 2013 Hearing, the Bill's sponsors made statements to the media that captured the Council's intent to regulate personal behavior through an E-Cig prohibition, even though E-Cigs have nothing to do with ETS. For example, Councilman Daniel Dromm, a sponsor of the Bill, stated:

> "As a co-sponsor of the bill, I am pleased the legislation banning indoor use of e-cigarettes passed," . . . "It doesn't matter that e-cigarettes only produce vapors. It's pretend smoking and it's ridiculous. I want to end smoking, period. Allowing e-cigarettes to remain unregulated would have only sent the wrong message." "City council levies wide-ranging e-cigarette ban," Queens Chronicle, December 26, 2013 (attached hereto as

Exhibit "**Q**" and available at: http://www.qchron.com/editions/queenswide/city-council-levies-wide-ranging-e-cigarette-ban/article_1f66c92f-778c-5923-81ea-906f24a9000f.html.

48. Following the Health Committee's approval of the Bill on December 19, 2013, Councilman James Gennaro, also a sponsor of the Bill, stated:

> "Electronic cigarettes are an unregulated product that threaten to turn back the important gains we as a city have made in the last decade to de-normalize the act of smoking and to maintain a clean air environment to live, work, and play . . . "E-Cigs Banned in NYC Public Spaces," The Gothamist, December 19, 2013 (attached hereto as Exhibit "**R**" and available at: gothamist.com/2013/12/19/e-cigs_likely_to_be_banned_in_publi.php).

49. The Health Committee released reports on December 4, 2013 and December 18, 2013 which contained an overview of the arguments for and against the Bill and recited the Committee's analysis of the Bill. (A copy of the December 4, 2013 Health Committee Report is attached hereto as Exhibit "**S**". A copy of the December 18, 2013 Committee Report is attached hereto as Exhibit "**T**"). Both reports stated that:

> "The bill's intent is to prohibit use of electronic cigarettes in public places and places of employment in order to facilitate the enforcement of the City's Smoke-Free Air Act and to protect youth from observing behaviors that could encourage smoking." (Exhibit "**S**" at p. 11; Exhibit "**T**" at p. 11).

50. On December 18, 2013 the Health Committee voted in favor of the Bill. Prior to that date, the Committee had made only technical amendments to the Bill as proposed.

51. The E-Cig Bill was approved by the Council on December 19, 2013 and signed into law by Mayor Bloomberg on December 30, 2013 as Local Law 152. A copy of the Local Law 152 Legislation Details (With Text) obtained from the Council's website is attached hereto as Exhibit "**U**".

52. The effective date of Local Law 152 is April 29, 2014, 120 days after the enactment date. *See*, Local Law 152 § 15, Exhibit "**U**" at p. 17.

LOCAL LAW 152 IS UNCONSTITUTIONAL IN VIOLATION OF THE ONE SUBJECT RULE

53. Following the Local Law 152 amendment, § 17-501, the title section of Chapter 5, the SFAA, which is not mentioned in Local Law 152, remains unchanged:

> §17-501 **Short title**. This chapter shall be known and may be cited as the "Smoke-Free Air Act." N.Y.C. Admin. Code §17-501.

54. As Chapter 5 now has two subjects in violation of the One Subject Rule, the first being protection of the public from the harmful effects of second-hand smoke exposure, and the second subject being regulation of E-Cigs, the title section is now inaccurate and misleading in that it still unequivocally declares that the subject of the SFAA is the regulation and prohibition of smoke exposure, and that only tobacco products which generate smoke exposure are subject to the provisions of Chapter 5.

55. Following the Local Law 152 amendment, N.Y.C. Admin. Code § 17-503 now reads:

> § 17-503 Prohibition of smoking and use of electronic cigarettes. a. Smoking [is], and using electronic cigarettes, are prohibited in all enclosed areas within public places. [Underlining in the original text of Local Law 152. Underlining represents changes to the SFAA by the Local Law 152 amendment]. Local Law 152 § 3, Exhibit "**U**" at p. 3

56. As evidenced by amended § 17-503, Chapter 5, the SFAA, now regulates (i) smoking resulting in ETS exposure on the one hand, and (ii) E-Cig use on the other - two distinct subjects in violation of the One Subject Rule. The distinct definitions assigned to smoking and vaping clearly delineate smoking and vaping as two wholly different activities that utilize different delivery mechanisms and create different by-products. As Charles D. Connor, former president of the American Lung Association, wrote in a recent opinion piece:

> "As a former president of the American Lung Association, I have seen how e-cigarettes have become the subject of much confusion and misinformation. Too often people think they are identical to conventional cigarettes that burn tobacco. Consequently they think

that e-cigs should fall under the same rules and restrictions. But they are not the same. E-cigarettes do not involve the exhalation of harmful smoke. They do not involve combustion, which has been recognized by the public health community for years as the real danger of a tobacco cigarette. To me the lesson is clear: *Different products require different regulations*." [Emphasis added]. "Opinion: E-Cig debate going off the rails," Chicago Tribune, January 15, 2014 (available at http://articles.chicagotribune.com/2014-01-15/opinion/ct-ecigs-restrictions-chicago-tobacco-smokers-pers-20140115_1_conventional-cigarettes-e-cigarettes-electronic-cigarettes; also attached hereto as Exhibit "**V**".

57. Moreover, every reference to "smoking" throughout Chapter 5 is now followed by "or using an electronic cigarette" or "and using an electronic cigarette." *See generally*, Local Law 152, Exhibit "**U**." The use of the words "and" and "or" before the phrase "using electronic cigarettes" suggests that even the Council recognized that it was adding a new subject to Chapter 5, since the words "and" and "or" are commonly and ordinarily used to link two distinct subjects.

58. In the "Legislative findings" section of Local Law 152, the Council provided six justifications for the addition of E-Cigs to Chapter 5:

(i) E-Cigs have not been approved by the FDA for smoking cessation and are currently unregulated by the FDA;
(ii) E-Cigs, which utilize nicotine, may interfere with smokers' attempts to quit;
(iii) E-Cigs may cause children who experiment with them to become addicted to nicotine and switch to cigarettes;
(iv) E-Cig use may interfere with enforcement of the Smoke-Free Air Act;
(v) E-Cig use may increase the social acceptability of smoking; and
(vi) An E-Cig ban will protect youth from observing behaviors that could encourage them to smoke.

Local Law 152 § 1, Exhibit "**U**" at p. 2.

59. These legislative findings, which are statements of purpose, show that E-Cig regulation is, even in the Council's words, at best, tangentially related to the subject of smoking, in much the same way that toy water guns are at best tangentially related to authentic firearms. Furthermore, E-Cig regulation is completely unrelated to the subject of ETS exposure, the core

of the SFAA. Local Law 152 is really about targeting personal behavior through regulation of a product rather than about protecting citizens from involuntary ETS exposure.

60. Until the Local Law 152 amendment, Chapter 5 was silent on "vaping," the use of E-Cigs. However, both before and after the Local Law 152 amendment, Chapter 5, the SFAA, which properly regulates ETS exposure but not E-Cigs, defines "smoking" as "inhaling, exhaling, burning or carrying any lighted cigar, cigarette, pipe, or any form of lighted object or device which contains tobacco." N.Y.C. Admin. Code § 17-502(y).

61. Local Law 152 added to § 17-502 a definition of "electronic cigarettes." Local Law 152 defines an E-Cig as an "electronic device that delivers vapor for inhalation." New § 17-502(qq) - Local Law 152 § 3 (Exhibit "**U**" at p. 2). This definition distinguishes the substance E-Cigs "deliver" from the substance emitted from smoking. E-Cigs "*deliver vapor*," whereas cigarettes emit "*tobacco*" smoke.

62. The findings of the Health Committee likewise distinguish between "smoking" and "vaping" and between "cigarette" use and "electronic cigarette" use. The Committee's Reports of December 4, 2013 and December 18, 2013 state that "electronic cigarettes are electronic devices that deliver nicotine, flavor, and other chemicals through vaporization or aerosolization". (Exhibit "**S**" at p. 2; Exhibit "**T**" at p. 2). Thus, in the Council's own words, E-cig use, or vaping, unlike traditional cigarette smoking, delivers and emits vapor without using tobacco, whereas traditional smoking involves the use of tobacco to emit tobacco smoke.

63. These vapor/smoke and vaping/smoking distinctions are supported by the Health Committee's recognition that vaping and smoking involve wholly distinct mechanisms and substances. The Committee further acknowledged that E-Cig use may be seen as "an alternative" to smoking. (Exhibit "**S**" at p. 3; Exhibit "**T**" at p. 3). Indeed, in the Reports, the Committee found that "the use of electronic cigarettes in the U.S., [is] commonly referred to as

'vaping,'…. Manufacturers and proponents of electronic cigarettes claim the devices offer users a safer alternative to smoking cigarettes, as electronic cigarettes can deliver nicotine without combusting tobacco and producing smoke." Id.

64. The Council's six justifications for its improper use of Chapter 5 to prohibit E-Cig use also supports the notion that exposure to second-hand smoke, or ETS, is one subject, and E-Cigs are a separate subject. *See*, Local Law 152 § 3, Exhibit "**U**" at p. 3, summarized in para. 47 herein. Not a single one of these six justifications has anything to do with the subject of smoking around others, or protecting citizens or workers from exposure to ETS.

65. Rather, the Council justified including E-Cigs in Chapter 5 to regulate the behavior of E-Cig users for speculative prophylactic reasons, and, upon information and belief, because the Council was unable or unwilling to enact a freestanding E-Cig ban without the cover afforded by tying E-Cig use to the convenient but utterly tangential "bogeyman" of smoking partnered with ETS. Thus, the Council has not only run afoul of the One Subject Rule, but has also done so in an intellectually dishonest manner. At least one Council member, Gentile, demonstrated a keen awareness of this intellectual dishonesty when he opined to Commissioner Farley that he and other supporters of Local Law 152 were "trying to fit a square peg into a round hole." *See*, Exhibit "**O**" pp. 2-3

66. Even assuming, *arguendo*, that E-Cigs "interfere with smoker attempts to quit" and E-Cig use "may increase social acceptability and of appeal of smoking,"[1] vaping is not

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[1] Assertions which are by no means accurate, in fact, multiple studies by respected sources indicate that E-Cigs *help* smokers quit. *See*, Riccardo Polosa, et al, Effect of an electronic nicotine delivery device (e-Cigarette) on smoking reduction and cessation: a prospective 6-month pilot study, *Harm Reduction Journal* **10** (10) [2013] (concluding that "substantial and objective modifications in the smoking habits may occur in smokers using e-Cigarettes, with significant smoking reduction and smoking abstinence and no apparent increase in withdrawal symptoms"), Available at http://www.biomedcentral.com/content/pdf/1471-2458-11-786.pdf ; *See*, Caponnetto, et al, [Mar 2013]. Electronic cigarette: a possible substitute for cigarette dependence,.*Monaldi Arch Chest Dis* **79** (1): 12–9. PMID 23741941 (concluding that electronic cigarettes help some smokers quit smoking).

smoking and does not generate second-hand smoke, or ETS, nor has the Council made any finding to the contrary. Second-hand smoke exposure is the one and only subject of Chapter 5, which tellingly, is still titled the "Smoke-Free Air Act," even though for all intents and purposes, Chapter 5 is now the "Smoke Free Air and E-Cig Act."

67. Since Local Law 152 amended Chapter 5 to cover two wholly separate subjects - protection of the public from the harmful effects of second-hand smoke exposure on the one hand, and regulation of E-Cigs on the other hand - Chapter 5, which has been a single local law since its enactment in 1988 and still is a single local law (the SFAA), now violates the One Subject Rule, as it no longer "inform[s] the public in general and members of the legislature in particular by the title of the bill what interests are likely to be affected by its becoming a law." *See*, Economic Power & Const. Co., 195 N.Y. at 296 (Exhibit "**E**"). This is the kind of misleading legislative act the One Subject Rule was enacted to prevent: "the fraudulent insertion of provisions upon subjects foreign to that indicated in the title." Id.

68. In adding an E-Cig prohibition to the smoking provisions already in place in Chapter 5, the Council perpetrated the kind of "legislative evil" the One Subject Rule was created to prevent. *See*, Economic Power & Const. Co., 195 N.Y. at 296 (Exhibit "**E**"). As Commissioner Farley conceded: "the smoke free air act doesn't apply." *See*, Exhibit "**P**".

AS AND FOR A FIRST CAUSE OF ACTION
(All Defendants)
Declaratory Judgment as to the Constitutionality of Local Law 152

69. Plaintiffs repeat and reallege the allegations set forth in paragraphs "1" through "68"of the Complaint as if set forth at length herein.

70. In enacting Local Law 152, the Council violated the One Subject Rule, as set forth in Article III, § 15 of the New York State Constitution, the MHR, Article 3 § 20(3), and the

New York City Charter, ch 2, § 32.

71. By reason of the foregoing, an actual and justiciable controversy exists in that Plaintiffs, including CLASH's members and Wishtart, as well as others similarly situated, will be unlawfully and unconstitutionally prevented from vaping at public places and places of employment in New York City, and will be unlawfully deceived and misled by Local Law 152.

72. Therefore, Plaintiffs seek a judicial declaration that Local Law 152 is unconstitutional, *ultra vires*, and null and void, in that Local Law 152 adds a second subject (electronic cigarettes) to Chapter 5, a single local law, and therefore violates the "One Subject Rule" contained in the New York State Constitution, Article III, § 15, the New York Municipal Home Rule Law, Article 3, § 20(3), and the New York City Charter, ch. 2, § 32.

AS AND FOR A SECOND CAUSE OF ACTION
(All Defendants)
Declaratory Judgment as to the Implementation and Enforceability of Local Law 152

73. Plaintiffs repeat and reallege the allegations set forth in paragraphs "1" through "72"of the Complaint as if set forth at length herein.

74. In enacting Local Law 152, the Council violated the One Subject Rule, as set forth in Article III, § 15 of the New York State Constitution, the MHR, Article 3 § 20(3), and the New York City Charter, ch 2, § 32.

75. By reason of the foregoing, an actual and justiciable controversy exists in that Plaintiffs, including CLASH's members and Wishtart, as well as others similarly situated, will be unlawfully and unconstitutionally prevented from vaping at public places and places of employment in New York City, and will be unlawfully deceived and misled by Local Law 152.

76. Therefore, Plaintiffs seek a judicial declaration that Local Law 152 may not be

implemented and is unenforceable on the basis that Local Law 152 is unconstitutional, *ultra vires*, and null and void, in that Local Law 152 adds a second subject (electronic cigarettes) to Chapter 5, a single local law, and therefore violates the "One Subject Rule" contained in the New York State Constitution, Article III, § 15, the New York Municipal Home Rule Law, Article 3, § 20(3), and the New York City Charter, ch. 2, § 32.

AS AND FOR A THIRD CAUSE OF ACTION
(All Defendants)
Permanent Injunction

77. Plaintiffs repeat and reallege the allegations set forth in paragraphs "1" through "76"of the Complaint as if set forth at length herein.

78. In enacting Local Law 152, the Council violated the One Subject Rule, as set forth in Article III, § 15 of the New York State Constitution, the MHR, Article 3 § 20(3), and the New York City Charter, ch 2, § 32.

79. By reason of the foregoing, an actual and justiciable controversy exists in that Plaintiffs, including CLASH's members and Wishtart, as well as others similarly situated, will be unlawfully and unconstitutionally prevented from vaping at public places and places of employment in New York City, and will be unlawfully deceived and misled by Local Law 152

80. Therefore, Plaintiffs seek a permanent injunction enjoining the Defendants from implementing or enforcing Local Law 152.

WHEREFORE, Plaintiff seeks a judicial declaration pursuant to C.P.L.R. § 3001:

(a) That Local Law 152 is unconstitutional, *ultra vires*, and null and void, in that Local Law 152 adds a second subject (electronic cigarettes) to Chapter 5 and therefore violates the "One Subject Rule" contained in the New York State Constitution, Article III, § 15, the New York Municipal Home Rule Law, Article 3, § 20(3), and the New York City Charter, ch. 2, § 32;

(b) That Local Law 152 may not be implemented and is unenforceable on the basis that Local Law 152 is unconstitutional, *ultra vires*, and null and void, in that Local Law 152 violates the "One Subject Rule";

(c) Permanently enjoining and restraining Defendants from implementing and enforcing Local Law 152.

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