

August 16, 2007

Special Term Clerk
Albany County Supreme Court
16 Eagle Street
Albany, NY 12207

Re: *Connecticut Valley Tobacconist, LLC v. Hooker, et al.*, Index No. 5161/07

To Whom it May Concern:

Please accept this letter as Plaintiff/Petitioner's reply brief in support of its Complaint/Petition and motion for a preliminary injunction.

Respondents' papers repeatedly refer to "the policy of the State of New York...to control tobacco use and to promote cessation from tobacco use." In fact, no such Statewide public policy exists. The law is clear that the sale of tobacco products to adults remains a legal and largely unrestricted activity. As explained in detail in Petitioner's main brief, the fact that the Legislature has chosen to only forbid the sale of tobacco to minors, and not to adults, is conclusive evidence that the public policy of the State is to allow tobacco sales to adults. Contrary to Respondents' view, the Legislature, rather than the Department of Health, is preeminent in setting the public policy of the State.

Respondents first argue that Petitioner is barred from availing itself of the New York courts because it is an out-of-state LLC, which is not authorized to do business in New York. Respondents argument misses the point entirely. Contrary to Respondents' assertions, no general prohibition exists against out-of-state companies bringing suit in New York. In fact, they are expressly authorized to do so under Section 803(a)(1) of the Limited Liability Company Law.

Under LLC Law § 808(a), the only prohibition against an out-of-state LLC bringing suit in New York is where the unlicensed LLC is improperly "doing business" in New York without authorization. For purposes of the LLC law, and the analogous provision of the Business Corporation Law,

"The party relying upon this statutory barrier bears the burden of proving that the corporation's business activities in New York

were not just casual or occasional, but so systemic and regular as to manifest continuity of activity in the jurisdiction. In this regard, there is a presumption that a plaintiff does business in its State of incorporation rather than in New York."

See Intesec Group, LLC v. Madah-Com, Inc., 2003 WL 25573936 (Sup Ct, N.Y. County 2003)(attached); see also Fine Arts Enter. v. Levy, 149 AD2d 795 (3d Dept 1989); Alicanto, S.A. v. Woolverton, 129 AD2d 601 (2d Dept 1987).

Notably, in Airline Exchange Inc. v. Bag, 266 AD2d 414 (2d Dept 1999), the court held that an unlicensed out-of-state corporation was not "doing business" in New York, and thus not barred from bringing suit, despite having a New York bank account, having a New York office and entering into several business transactions in New York. Likewise, Petitioner, a Connecticut LLC, is presumed to be doing business in Connecticut, and Respondents have failed to rebut the presumption.¹

Petitioner's article 78 claims are, quite simply, to annul Respondents' determination as contrary to law, in excess of authority and as arbitrary and capricious. Respondents argue that Petitioner has failed to demonstrate how they have exceeded their authority. To the contrary, it is abundantly clear that, given the Legislature's statutory enactments permitting tobacco sales to adults, that Respondents are not authorized by any statute to deny access to tobacco products to adults wishing to purchase those products at the Fair. As administrative officials, Respondents are only authorized to act to the extent they are permitted to do so by the Legislature. See Boreali v. Axelrod, 71 NY2d 1 (1987). They have failed to cite any relevant statutory authority granting them the power to regulate or ban tobacco sales at the Fair to adults. As such, their actions must be annulled.

Similarly, Respondents have failed to articulate a coherent rationale for their unprecedented banning of tobacco sales at the Fair. As such their actions are arbitrary and capricious. Respondents repeatedly cite policies of the Department of Health aimed at reducing smoking. Even if the Court were to somehow construe the Department of Health's actions as overriding the express policies of the Legislature regarding tobacco sales to adults, it is an undisputed fact that smoking is not banned at the Fair. It is only the sale of tobacco which is banned. Therefore, Respondents are asserting that people walking around the Fairgrounds with sealed cigar boxes purchased from Petitioner are more of a threat to public health than countless people actually smoking, thereby exposing everyone at the Fair to the effects of second-hand smoke. Respondents argument is simply absurd on its face.

¹ The United Environmental case cited by Respondents is not to the contrary, as there is no discussion in that case of the level of business activity carried on by the out-of-state company.

Additionally, Respondents argue that it would somehow be inconsistent to allow tobacco to be sold at an event where the Department of Health was promoting a cessation of tobacco use. Notably, the Department of Health is also on a campaign against obesity. See Public Health Law § 260 et. seq. (New York Obesity Prevention Act). Yet, Respondents see no inconsistency in allowing the sale of numerous unhealthy food items at the Fair. Additionally, under Respondents' argument the sale of tobacco should be banned anywhere DOH has a presence; for example, the kiosk in the building where DOH has an office.

Moreover, if as Respondents baldly assert, a Statewide public policy truly exists against the sale of tobacco to adults, then it is inconsistent for any state agency, or any political subdivision of the State such as a county or village, to allow tobacco sales at any public event. The mere fact that DOH is setting up an informational booth at the Fair does not somehow give Respondents added administrative power to ban tobacco sales, that they would not otherwise have at events where DOH was not physically present.

Respondents "inconsistency" rationale makes crystal clear that their true motivation in banning tobacco sales is not to protect the health of people at the Fair, but rather that it is to prevent anyone from promoting a message that contradicts the Department of Health's position. Notably, Respondents admit that one of their motivations in implementing the ban on tobacco sales is "decreasing the social acceptability of tobacco use." Resp. Brief, at 7. This rationale has nothing to do with protecting public health, rather it is to send a social and political message that use of tobacco should be considered abnormal or deviant behavior.

By making the argument that the mere presence of tobacco sales sends a message that tobacco use is acceptable, Respondents are essentially conceding Petitioner's point that there is expressive activity in Petitioner's act of selling tobacco, because of the manner in which it is likely to be perceived by the public at large. Accordingly, based on the cases cited in Petitioner's main brief and in Respondents' brief, Petitioner's act of selling tobacco is entitled to First Amendment protection, as commercial speech and as promoting a social message.

Turning to the SAPA issue, Respondents have clearly enacted a rule of general applicability which qualifies as a "rule" under SAPA. Although Respondents attempt to equate banning tobacco sales with mundane decisions such as what entertainment to provide at the Fair, they have enacted a rule which goes beyond this year's State Fair. As Respondents April 4 letter indicates, tobacco is being banned at all events held on the Fairgrounds, not just at the State Fair itself. Presumably, this also includes next year's State Fair and all future State Fairs. In addition to further undermining their argument that the ban is somehow tied to the presence of the Department of Health at the Fair, the fact that the ban applies to all events held on the Fairgrounds demonstrates the sweeping nature of Respondent's ban on tobacco sales, thereby bringing it within the scope of SAPA.

Lastly, Respondents argue that injunctive relief is not proper in this case because

Petitioner has no legal right to sell at the Fair and because he would suffer no irreparable harm. This argument is entirely specious. First of all, Respondent's April 4 letter makes clear that the sole reason for the denial of Petitioner's application to sell at the Fair was that he planned to sell tobacco. No other reason was giving for denying the application. Moreover, Respondents even said that Petitioner would be welcome to sell a different product. Thus, the record is clear that if Petitioner were selling a different product, his application would have been granted.

As the accompanying affidavit of Michael Tarnowicz demonstrates, Petitioner clearly would suffer irreparable harm in the absence of being able to sell at this year's Fair. In addition to the direct sales from the Fair, which cannot be calculated with certainty, the business generated at the Fair leads to additional business for Petitioner throughout the year. These amounts vary from year to year and thus cannot be reduced to an ascertainable claim for money damages. Thus, an injunction is the only relief which will sufficiently protect Petitioner in this case. As the cases cited in Petitioners' main brief indicate, uncertain monetary losses of this nature are a sufficient basis for a showing of irreparable harm.

In sum, Petitioner respectfully requests that this Court (1) grant the Petition and motion for a preliminary injunction, (2) annul Respondents' April 4 determination, and (3) declare that Petitioner is entitled to sell tobacco products at the 2007 State Fair.

Truly Yours,

David W. Novak