

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of

VAPOR TECHNOLOGY ASSOCIATION,
BENEVOLENT ELIQUIDS INC., and
PERFECTION VAPES, INC.,

Petitioners,

against

ANDREW M. CUOMO, Governor of the State of New York,
NEW YORK STATE DEPARTMENT OF HEALTH,
HOWARD ZUCKER, M.D., Commissioner of
The New York Department of Health, THE PUBLIC
HEALTH AND HEALTH PLANNING COUNCIL,
and NEW YORK STATE POLICE,

Index No.
Date Purchased:

**NOTICE OF
VERIFIED PETITION**

Respondents.

For a Judgment Under Article 78 of the Civil Practice Law
And Rules in the Nature of ANNULMENT, DECLARATORY
JUDGMENT AND PRELIMINARY AND PERMANENT
INJUNCTIVE RELIEF.

**ORAL ARGUMENT
REQUESTED**

-----X

PLEASE TAKE NOTICE that upon the Annexed Verified Petition herein dated September 24, 2019 of Petitioners VAPOR TECHNOLOGY ASSOCIATION (“VTA”), BENEVOLENT ELIQUIDS INC. (“Benevolent”), and PERFECTION VAPES, INC. (“Perfection,” together with VTA and Benevolent, collectively, “Petitioners”), by and through their attorneys, THOMPSON HINE LLP, the Affidavit of Anthony L. Abboud sworn to the 23rd day of September 2019, the Affidavit of Victor Canastraro sworn to the 23rd day of September 2019, the Affidavit of John Dunham sworn to the 23rd day of September 2019, the Affirmation of Richard De Palma, Esq. dated the 24th day of September 2019 and the Affirmation of Emergency of Richard De Palma, Esq. dated the 24th day of September 2019; and the exhibits annexed

thereto, and all of the prior pleadings and proceedings heretofore had herein, and sufficient reason appearing therefrom, the undersigned will make an application to this Court, at the Motion Part of this Court, at the Courthouse thereof, located at 16 Eagle Street, Albany, New York, on the 25th day of October, 2019 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order and Judgment, pursuant to Articles 63 and 78 of the New York Civil Practice Law and Rules:

- (i) declaring that Respondents **ANDREW M. CUOMO** in his capacity as Governor of the State of New York (“Governor Cuomo”), **THE NEW YORK DEPARTMENT OF HEALTH** (the “Department of Health”), **HOWARD ZUCKER, M.D.** in his capacity as the Commissioner of The New York Department of Health (“Commissioner Zucker”), **THE PUBLIC HEALTH AND HEALTH PLANNING COUNCIL** (the “Council”), and **NEW YORK STATE POLICE** (“State Police,” and together with Governor Cuomo, the Department of Health, Commissioner Zucker, and the Council, collectively, “Respondents”) have improperly enacted, by emergency executive action, an amendment to Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”) to add a new Subpart 9-3, titled “Prohibition on the Sale of Electronic Liquids with Characterizing Flavors” (the “Emergency Rule”) in excess of their constitutional, statutory and administrative authority;
- (ii) annulling the Emergency Rule;
- (iii) preliminarily and permanently enjoining and preventing Respondents from enforcing the Emergency Rule; and
- (iv) granting to Petitioners such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 7804(c) Respondent's answer and supporting affidavits, and any other papers in opposition to the above special proceeding, if any, are required to be served upon the undersigned at least five days before the above return date.

PLEASE TAKE FURTHER NOTICE that Petitioners request Oral Argument of this application.

Venue in Albany County is proper under pursuant CPLR 506(b).

Dated: New York, New York
September 24, 2019

THOMPSON HINE LLP



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*Attorneys for Petitioners
Vapor Technology Association
Benevolent ELiquids Inc. and
Perfection Vapes, Inc.*

TO:

Respondent Andrew M. Cuomo
Office of the Governor of New York State
State Capitol Building
Albany, New York 12224

Respondent The New York Department of Health
Corning Tower, Empire State Plaza
Albany, New York 12237

Respondent Howard Zucker, M.D.
Commissioner of The New York Department of Health
Corning Tower, Empire State Plaza
Albany, New York 12237

Respondent The Public Health and Health Planning Council
Corning Tower, Empire State Plaza
Albany, New York 12237

Respondent New York State Police
1220 Washington Avenue, Building 22
Albany, New York 12226

With copy to:

The Office of the Attorney General
Empire State Plaza, Justice Building, 2nd Floor
Albany, New York 12224

SUPREME COURT OF THE STATE OF NEW YORK
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Petitioners VAPOR TECHNOLOGY ASSOCIATION (“VTA”), BENEVOLENT ELIQUIDS INC. (“Benevolent”), and PERFECTION VAPES, INC. (“Perfection,” together with VTA and Benevolent, collectively, “Petitioners”), by and through their attorneys, THOMPSON HINE LLP, as for their Verified Petition in this matter against Respondents ANDREW M. CUOMO in his capacity as Governor of the State of New York (“Governor Cuomo”), THE NEW YORK DEPARTMENT OF HEALTH (the “Department of Health”), HOWARD ZUCKER, M.D. in his capacity as the Commissioner of The New York Department of Health (“Commissioner Zucker”), THE PUBLIC HEALTH AND HEALTH PLANNING COUNCIL

(the “Council”), and NEW YORK STATE POLICE (“State Police,” and together with Governor Cuomo, the Department of Health, Commissioner Zucker, and the Council, collectively, “Respondents”), respectfully set forth and allege as follows:

PRELIMINARY STATEMENT

1. This is a Special Proceeding, pursuant to Articles 63 and 78 of the Civil Practice Law And Rules seeking: (i) a declaratory judgment that Respondents have improperly enacted, by emergency executive action, an amendment to Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”) to add a new Subpart 9-3, titled “Prohibition on the Sale of Electronic Liquids with Characterizing Flavors” (the “Emergency Rule”) in excess of constitutional, statutory and administrative authority; (ii) judgment annulling the Emergency Rule; (iii) a temporary restraining order, a preliminary injunction and a permanent injunction preventing Respondents from enforcing the Emergency Rule.

2. The Emergency Rule imposing a ban on non-tobacco- and non-menthol-flavored vapor products enacted by Respondents exceeds their statutory authority, is arbitrary and capricious, and fails to comply with the State Administrative Procedure Act. Petitioners, including Benevolent ELiquids, a Buffalo, New York-based e-liquid manufacturer, and Perfection Vapes, a Buffalo-based retailer of vapor products, will be irreparably harmed by the Emergency Rule’s imminent enforcement, as they will be forced to shut down their business operations entirely.

3. Indeed, virtually all of the over 700 businesses that comprise New York’s vapor products industry confront the same imminent fate. The balance of equities also favors Petitioners, as they merely seek to preserve the status quo while Respondents pursue stricter regulation of “flavored” vapor products through legislation.

4. Moreover, the Emergency Rule will directly affect members of the General Public who utilize non-tobacco- and non-menthol-flavored e-liquids as part of their combustible tobacco cessation efforts.

5. For these reasons, as explained in greater detail below, the Court should temporarily preliminarily enjoin enforcement of the Emergency Rule pending a determination on the Petition, and should ultimately enter a declaratory judgment and permanent injunction that the Emergency Rule is *ultra vires*, void, and unenforceable.

SUPPORTING AFFIDAVITS AND EVIDENCE

6. In support of this Petition, Petitioners submit the accompanying Memorandum of Law dated September 24, 2019, together with the accompanying Affidavit of Anthony L. Abboud sworn to the 23rd day of September 2019 (“Abboud Aff.”), the Affidavit of M. Jonathan Glauser sworn to the 23rd day of September 2019 (the “Glauser Aff.”), the Affidavit of Victor Canastraro sworn to the 23rd day of September 2019 (the “Canastraro Aff.”), the Affidavit of John Dunham sworn to the 23rd day of September 2019 (the “Dunham Aff.”), the Affirmation of Richard De Palma, Esq. dated the 24th day of September 2019 (the “De Palma Aff.”) and the Affirmation of Emergency of Richard De Palma, Esq. dated the 24th day of September 2019 (“Emergency Aff.”), and the exhibits annexed thereto, all of which are incorporated herein by reference.

PARTIES

7. The Vapor Technology Association (“VTA”) is a national non-profit industry trade association with a principal place of business located at 1201 Pennsylvania Avenue, N.W., Suite 530, Washington, DC 20004.

8. VTA's more than 800 members are dedicated to developing and selling high quality vapor product that provide adult consumers with a safer alternative to traditional combustible cigarettes.

9. VTA has many members in New York State.

10. VTA's membership includes manufacturers of aerosolizing apparatuses—commonly known as vapor devices or e-cigarettes—manufacturers of nicotine-containing e-liquids, flavorings, and components, as well as wholesales, importers, and e-commerce and brick-and-mortar retailers.

11. Since its founding, VTA has been as the forefront of the most critical issues confronting the vapor industry, including adopting the industry's first comprehensive set of marketing standards intended to ensure that vapor products are properly marketed towards adults only and are not accessible to minors.

12. In its role as the industry's leading national trade association representing companies from every sector of the vapor industry, VTA has a vital interest in ensuring that any regulation of vapor products imposed by the State of New York is consistent with statutory and constitutional requirements.

13. VTA has standing to bring this suit because (a) its members would otherwise have standing to sue in their own right; and (b) the interests the VTA seeks to protect are germane to the organization's purpose of ensuring the continued availability in the United States and in New York of high quality vapor products to adult consumers that are former smokers.

14. Petitioner Benevolent E-Liquids, Inc. ("Benevolent"), is a corporation organized and existing under the laws of the State of New York with a principal place of business located at 5795 Transit Road, Depew, New York, 14043. Benevolent is a VTA member and manufacturer

and distributor of e-liquids for use with vapor products and distributed to retailers throughout New York and the United States. Benevolent offers approximately 1,400 flavors, with close to 50 percent of those flavors including menthol.

15. Petitioner Perfection Vapes, Inc. (“Perfection”), is a corporation organized and existing under the laws of the State of New York with a principal place of business located at 5860 Transit Road, Depew, New York, 14043. Perfection is a retailer of e-liquids for use with vapor products.

16. Respondent Andrew M. Cuomo (the “Governor” or “Governor Cuomo”) is the 56th Governor of New York State and as such is the head of the Executive Branch of the Government of the State of New York, and has a principal office located at the Office of the Governor of New York State, State Capitol Building, Albany, New York 12224.

17. Respondent the New York State Department of Health (the “Department of Health” or “DOH”) is an agency of the Executive Branch of the Government of the State of New York with its principal office located at Corning Tower, Empire State Plaza, Albany, New York 12237.

18. Respondent Howard Zucker, M.D. (the “Commissioner”) is the Commissioner of the Department of Health with his its principal office located at Corning Tower, Empire State Plaza, Albany, New York 12237.

19. The Public Health and Health Planning Council (the “Council” or “PHHPC”) is an advisory council of the Department of Health empowered by Section 225 of the New York Public Health Law to, among other things, advise the Commissioner on issues related to the preservation and improvement of public health. The Council maintains with its principal office at Corning Tower, Empire State Plaza, Albany, New York 12237.

20. Respondent New York State Police (“State Police”) is part of the Executive Branch of the Government of the State of New York and its principal law enforcement agency, with a principal place of business located at 1220 Washington Avenue, Building 22, Albany, New York 12226-225.

VENUE AND JURISDICTION

7. This Court has jurisdiction, pursuant to CPLR § 7803(2), to issue the relief requested herein as each Respondents is “a body or officer . . . proceeding or . . . about to proceed without or in excess of jurisdiction.”

8. Venue is proper in this County pursuant CPLR 506(b).

FACTUAL BACKGROUND

I. Vapor Products Are a Less Harmful Alternative to Combustible Cigarettes that Are Widely Used by Former Smokers in a Variety of Flavors, Including Non-Tobacco and Non-Menthol Flavors.

9. Vapor devices, also known as “electronic cigarettes,” “e-cigarettes,” or “electronic nicotine delivery systems (ENDS)” are handheld electronic devices that are used to heat and aerosolize a liquid mixture (“e-liquid”) that contains nicotine.¹ *See* Canastraro Aff. at ¶ 4. Once the e-liquid is aerosolized, the user of the vapor device inhales the aerosolized “vapor”

¹ The vapor products at issue in this case only involve nicotine-containing vapor products, not products derived from or containing cannabis, tetrahydrocannabinol (THC), or cannabidiol (CBD). This distinction is crucial in light of the recent certain health effects that have been portrayed as being associated with “vaping.” The publicly available evidence makes clear that these health issues have all been associated with adulterated THC products, which products containing vitamin E acetate, not the nicotine-containing products that are the subject of this Petition. *See* Lena H. Sun, “Contaminant found in marijuana vaping products linked to deadly lung illnesses, tests show,” Washington Post, September 6, 2019, available at <https://www.washingtonpost.com/health/2019/09/05/contaminant-found-vaping-products-linked-deadly-lung-illnesses-state-federal-labs-show/>.

in a manner similar to that of inhaling actual tobacco smoke, but without the fire, flame, tar, carbon monoxide, ash, stub, or smell associated with traditional combustible cigarettes. *Id.*

10. The e-liquids used in vapor devices are typically made with a mixture of propylene glycol and/or vegetable glycerin, flavorings, and pharmaceutical grade nicotine. *Id.*, ¶ 6.

11. E-liquids can be found in both “open system” and “closed system” vapor products. *Id.* In an “open” system, the device does not come pre-filled; rather, the user will separately buy bottled e-liquid(s) and use them to fill the device’s e-liquid reservoir, or “tank.” *Id.*, ¶ 5. In contrast, in a “closed” system, either the device itself or interchangeable pods or cartridges intended for use with the device will come pre-filled with a particular type of e-liquid. *Id.* E-liquids are sold to consumers in a variety of flavors, bottle sizes (for open systems), and nicotine concentrations, including zero nicotine products, and users thus have the option to reduce their nicotine intake and/or wean themselves from nicotine use entirely. *Id.*, ¶ 6.

12. Vapor products first gained traction in the United States around 2009. *See* Abboud Aff. at ¶ 19. The vapor products and e-liquids available on the market today contain a wide array of offerings to meet the varied needs and demands of adult consumers, many of whom are current or former smokers. Canastraro Aff. at ¶ 7; *see also* Glauser Aff. at ¶ 6.

13. In their role as an alternative to combustible cigarettes, vapor products have been studied extensively, with a consensus that they pose far lesser risk than combustible cigarettes and hold great potential as a public health harm reduction tool.

14. By way of example, a comprehensive study of all peer-reviewed literature on vapor products conducted by the National Academies of Sciences, Engineering and Medicine that was commissioned by FDA found that: “across a range of studies and outcomes, e-cigarettes

pose less risk to an individual than combustible tobacco cigarettes,” including conclusive evidence that substituting such products for combustible cigarettes “reduces users’ exposure to numerous toxicants and carcinogens” and substantial evidence that switching results in reduced short-term adverse health outcomes in several organ systems. Abboud Aff. at ¶ 16.

15. The United Kingdom’s Royal College of Physicians has concluded that the potential hazard to health arising from long-term use of vapor products is, at most, five percent (5%) of the comparable harm resulting from the use of traditional combustible cigarettes. *Id.*, ¶ 14.

16. Another study concluded that switching from traditional cigarettes to vapor products would prevent between 1.6 million and 6.6 million premature deaths over ten years in the United States. *Id.*, ¶ 15.

17. Finally, one randomized clinical study published in the New England Journal of Medicine earlier this year concluded that cigarette smokers were almost twice as likely to quit smoking when using e-cigarettes than when using nicotine replacement therapies such as lozenges and patches, while another study of over 18,000 smokers found that those using e-cigarettes as a quitting aid were almost three times more likely to succeed in their efforts to quit after 12 months than those using nicotine gums, patches, and lozenges. *Id.*, ¶ 17.

18. The impact of the availability of a wide variety of vapor products, including non-tobacco and non-menthol e-liquids, on consumer demand for traditional combustible cigarettes has been significant.

19. The Centers for Disease Control reports that the number of smokers as a percentage of the U.S. population dropped dramatically from 20.6 percent in 2009, to only 14 percent as of 2017. *Id.*, ¶ 19.

20. Similarly, between June 2018 and June 2019, U.S. cigarette sales volumes fell by more than 10 percent. *Id.*

21. In short, the science makes clear that vapor products are ultimately harm-reducing—decreasing dependency on harmful combustible cigarettes and even assisting individuals in ceasing nicotine use completely.

II. Nicotine-Containing Vapor Products Are Heavily Regulated at the Federal Level by the U.S. Food and Drug Administration.

22. Nicotine-containing vapor products, including flavored e-liquids, are heavily regulated by the Food and Drug Administration.

23. In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act (the “TCA” or the “Act”), Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. §§ 387, *et seq.*).

24. The TCA added a new Chapter IX to the federal Food, Drug and Cosmetic Act (“FDCA”) and significantly altered federal regulation of tobacco products by, for the first time, granting FDA the statutory authority to regulate tobacco products.

25. On May 10, 2016, FDA finalized its so-called “Deeming Rule”² under the TCA that, for the first time, deemed e-liquids containing, and vapor devices containing or intended to be used with, nicotine derived from tobacco plants to be “tobacco products” under the FDCA’s definition (the “Newly Deemed Products”). *See* 81 Fed. Reg. 28,974 – 29,106 (May 10, 2016).

26. The Deeming Rule took effect on August 8, 2016. 81 Fed. Reg. at 28,974.

² U.S. Food & Drug Admin., *Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products*, 81 Fed. Reg. 28,973 (May 10, 2016) (codified at 21 C.F.R. § 1143.1) (hereafter, “Deeming Rule”).

27. In the three years since the Deeming Rule took effect, all Newly Deemed Products, including vapor products, have been required to comply with a number of regulatory requirements imposed by the TCA and enforced by FDA.

28. By way of example, immediately upon the August 8, 2016, effective date of the Deeming Rule, vapor product companies became subject to certain record preservation requirements and could no longer market their products with certain advertising and labeling claims—so called “modified risk” claims. *See* 81 Fed. Reg. at 28,974, 28,976; 21 U.S.C. §§ 387i, 387k.

29. FDA was also authorized to regulate the methods used in manufacturing and testing vapor products and to mandate new product standards regarding the composition and characteristics of vapor products. 21 U.S.C. §§ 387f(e), 387g. In 2017, vapor product manufacturers were required to file with FDA copies of “health documents” relating to “health, toxicological, behavioral, or physiologic effects” of their products under 21 U.S.C. § 387d(a)(4).

30. That same year, all U.S. businesses engaged in the manufacture of vapor products were required to register their establishment(s) with FDA and open them to FDA inspection under 21 U.S.C. § 387e(a)(1), (b), (g). Each business was also required to identify every one of its vapor products to FDA, including providing copies of product labels and samples of advertisements. 21 U.S.C. § 387e(i)(1).

31. In 2018, manufacturers and importers of vapor products submitted to FDA all ingredients found in their finished tobacco products as required by 21 U.S.C. § 387d(a)(3). These companies also complied with comprehensive new labeling, packaging and advertising requirements, including the nicotine warning requirement set forth in 21 C.F.R. § 1143.3(a)(1)-(2), which requires prominently placing the following nicotine addiction warning on any vapor

products containing e-liquid: **“WARNING: This product contains nicotine. Nicotine is an addictive chemical.”**

32. Like the Petitioner VTA’s other members, Petitioner Benevolent ELiquids has complied with each of these federal regulatory requirements. Canastraro Aff at ¶ 21.

33. As a result of the Deeming Rule, FDA now has robust information regarding the vapor industry and vapor products, including: (i) the identities and locations of vapor product manufacturers; (ii) the products manufactured and sold by those manufacturers; (iii) the ingredients found in those products; and (iv) studies performed by vapor businesses regarding the health effects of those products.

III. Scientific Evidence and Petitioners’ Experiences Suggest that Many Former Smokers Rely on Non-Tobacco and Non-Menthol-Flavored Vapor Products.

34. Both extensive scientific research and the personal experiences of Petitioners suggest that former smokers tend to rely on non-tobacco and non-menthol-flavored vapor products to avoid smoking combustible cigarettes.

35. The extensive peer-reviewed scientific evidence suggests that adults of all ages prefer many categories of e-liquid flavors – including fruits, sweets, and cool flavors – and widely use non-tobacco- and non-menthol-flavored products. *See* Abboud Aff. at Ex. 3 “VTA ANPRM Flavor Comments” at 15.

36. Indeed, two studies of data from the Population Assessment of Tobacco and Health (PATH) longitudinal survey have demonstrated the harm reduction potential of access to a variety of non-tobacco flavors by finding use of non-tobacco flavored e-cigarettes to be positively associated with a lower quantity of combustible cigarette use over time and greater success with quit attempts. *Id.* at 16-17 (citing Buu, et al. (2018), and Chen (2018)).

37. Numerous surveys and peer-reviewed scientific literature have found that flavor availability and use of flavored vapor products was important to, and played a key role in, smokers shifting from combustible cigarettes and towards less harmful options and smoking cessation. *Id.* at 17-20.

38. The authors of one study even went so far as to state that “regulators should carefully examine the cost-benefit of banning flavors,” as “the current available science would **not** support a decision to do so.” *Id.* at 19 (emphasis added) (citing Tackett, et al.).

39. Indeed, one study, a discrete choice experiment by Buckell, et al. (2018), paints a stark and deeply troubling picture of the adverse impact a flavor ban will have for former cigarette smokers. Abboud Aff. at Exhibit 3 “VTA ANPRM Flavor Comments” at 38-39. In that study, a sample of 2,031 adult smokers and recent quitters indicated that a ban on all non-tobacco flavors in vapor products, while allowing menthol in cigarettes, would result in an **8.3 percent increase in demand for cigarettes**. *Id.* These results led the authors to conclude that “[a] ban on flavored e-cigarettes alone would likely increase the choice of cigarettes in smokers, arguably the most harmful way of obtaining nicotine.” *Id.*

40. These scientific studies are backed up by of New York vape shop owners’ observations of their clientele.

41. Victor Canastraro, the owner of Petitioner Benevolent ELiquids and Perfection Vapes, reports that approximately 90 percent of the e-liquid orders Benevolent ELiquids receives are for non-tobacco flavored e-liquids and that retailers that distribute Benevolent’s product lines tend to order significantly less tobacco flavored e-liquid than other flavors. Canastraro Aff. at ¶¶ 14-15.

42. Additionally, less than 1 percent of Benevolent’s total revenues come from the sale of menthol-flavored e-liquid. *Id.*, ¶ 14.

43. Canastraro reports that the customer base of his vape shop, Perfection Vapes, is composed of current and former combustible cigarette smokers with an average age of 36. *Id.*, ¶¶ 16-17. His regular customers have been able to reduce dramatically or eliminate entirely their nicotine consumption over time, with between 25 and 30 percent stopping not only smoking, but vaping as well. *Id.*, ¶ 18.

44. As reported in the scientific literature, Canastraro has observed that while new customers who are smokers will often start vaping with a tobacco flavored e-cigarette, they will often switch to a non-tobacco flavor in short order so that they are not reminded of the taste of combustible cigarettes. *Id.*, ¶ 20.

IV. Scientific Evidence Suggests that Illegal Youth Use of Vapor Products Is Not Driven Primarily by the Existence of Non-Tobacco and Non-Menthol Flavors.

45. As regards illegal use of vapor products by youth, the existing data and scientific literature does not support the conclusion, stated in the Emergency Rule, that “youth e-cigarette use has [been] . . . driven primarily by the abundance of e-liquid flavors,” nor that “restricting the availability of flavored e-liquids will deter youth from initiating e-cigarette use and reduce ongoing e-cigarette use.” *De Palma Aff.* at Exhibit A “Emergency Rule” at 4.

46. First, e-liquids have been available in hundreds, if not thousands, of flavors since vapor products first gained traction in the United States over ten years ago, yet, according to Respondents, the significant increase in illegal youth use of vapor products occurred only in the last several years. *See De Palma Aff.* at Ex. A “Emergency Rule” at 5.

47. Second, much of the existing scientific evidence only demonstrates that, at best, flavors may be one factor among several for why youth illegally use vapor products. For

example, one longitudinal study found that a “good flavors” response for why middle and high school students had tried e-cigarettes was **not** a significant predictor of either continued use or more frequent use of e-cigarettes. Abboud Aff. at Ex. 3 “VTA ANPRM Flavor Comments” at 29-30.

48. Rather, using e-cigarettes to quit smoking was the most robust predictor of continued e-cigarette use. *Id.* Many other studies have found that reasons besides flavors are often equally or more frequently cited by youth as their reasons for illegally using vapor products and some studies have found the availability of flavors as not even being among the top three to four reasons why youth use vapor products. *Id.* at 30.

49. Nevertheless, to address concerns about illegal youth use of vapor products, in 2017, Petitioner VTA, an 800-member national trade association, developed and then promoted the VTA Marketing Standards for Membership, which consists of twelve marketing standards intended to prevent minor access to vapor products and ensure that all marketing of such products is directed only to adults to the greatest extent possible. *See* Abboud Aff. at ¶ 6.

50. As a VTA member, Benevolent ELiquids adheres to the marketing standards in its own operations. Canastraro Aff at ¶ 16.

51. VTA has also suggested several concrete steps that FDA and other regulators could take to combat this issue that would be more effective than restricting the availability of flavored vapor products from the market entirely. Abboud Aff. at ¶ 11.

52. These steps include requiring online retailers to conduct third-party authentication of a purchaser’s age, more rigorously restricting improper sales of vapor products through online third-party marketplaces, issuing more “no tobacco sale” orders to businesses that have been caught repeatedly selling to minors, and imposing additional marketing and advertising

restrictions along the lines of those set forth in the VTA's Marketing Standards for Membership.
Id.

V. In Its Last Legislative Session New York's Legislature Sought to Address Concerns About Illegal Youth Vaping by Increasing the Minimum Age to Purchase Vapor Products from 18 to 21.

53. In light of concerns regarding the recent increase in illegal youth vaping in its 2019 legislative session the New York State Assembly actively considered, but then ultimately tabled, a bill that would have imposed a ban on the sale of non-tobacco- and non-menthol-flavored vapor products. *See De Palma Aff. at Ex. D (2019 N.Y. SB 1181); Ex. E (2019 N.Y. AB 4787); see also Id. at Ex. B (2017 N.Y. SB 8610); and Ex. C (2017 N.Y. AB 8688).*

54. Instead, to address the issue of illegal youth vapor product use, the Assembly enacted legislation that increases the age for purchase of vapor products to 21, which goes into effect on November 13, 2019. *See De Palma Aff. at Ex. I (2019 N.Y. ALS 100, 2019 N.Y. AB 558).*

VI. Despite the Scientific Evidence Regarding the Public Health Dangers of Such a Move, Respondents Took Advantage of Public Concern Regarding Severe Respiratory Illnesses Resulting from Adulterated or Black-Market THC Products to Enact the Emergency Rule Prohibiting the Manufacture, Possession, or Sale of Nicotine-Containing Vapor Products that Are Not Tobacco or Menthol Flavored.

55. On September 15, 2019, Respondent Governor Andrew Cuomo announced he would take executive action to ban the sale of flavored vapor products in New York. Press Release, *Governor Cuomo Announces Emergency Executive Action to Ban the Sale of Flavored E-Cigarettes*, September 15, 2019, available at <https://www.governor.ny.gov/news/governor-cuomo-announces-emergency-executive-action-ban-sale-flavored-e-cigarettes>.

56. Despite the fact that the New York Department of Health had already reported that it had identified adulterated or black-market THC-containing products as a principal area of

investigation into the recent spate of severe respiratory illnesses,³ the Governor’s September 15, 2019 press release failed to differentiate in any manner these illegal and unregulated THC-containing products from the legal and heavily regulated nicotine-containing vapor products that have existed in the U.S. and New York markets for more than ten years. In fact, the New York State Department of Health after conducting its tests concluded “Laboratory test results showed very high levels of vitamin E acetate in nearly all cannabis-containing samples analyzed by the Wadsworth Center as part of this investigation. At least one vitamin E acetate containing vape product has been linked to each patient who submitted a product for testing. Vitamin E acetate is not an approved additive for New York State Medical Marijuana Program-authorized vape products and **was not seen in the nicotine-based products that were tested.**”

57. On September 15, 2019, Governor Cuomo further announced that the Commissioner would hold an emergency meeting with the Council to ban flavored vapor products. *Id.* Without any supporting citation, and directly contrary to known evidence about the use of flavored vapor products, Governor Cuomo claimed that manufacturers of flavored e-cigarettes “are intentionally and recklessly targeting young people.” *Id.*

58. On September 16, 2019, the Council announced that it would hold meetings starting at 2:30 p.m. the following day regarding the planned flavor ban via videoconference in

³ See Press Release, *New York State Department of Health Announces Update on Investigation into Vaping-Associated Pulmonary Illnesses*, September 5, 2019, available at https://health.ny.gov/press/releases/2019/2019-09-05_vaping.htm.

New York City, Buffalo, Rochester, and Albany.⁴ The Council also released the proposed emergency rule (the “Emergency Rule”).⁵

59. The Emergency Rule provides that “[i]t shall be unlawful for any individual or entity to possess, manufacture, distribute, sell or offer for sale any flavored e-liquid or product containing the same.” 10 NYCRR Subpart 9.3-2. The Emergency Rule defines “flavored e-liquid” as “e-liquid with a distinguishable taste or aroma, other than the taste or aroma of tobacco or menthol, . . . including but not limited to tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, mint, wintergreen, herb, or spice, or any ‘concept flavor’ that imparts a taste or aroma that is distinguishable from tobacco flavor but may not relate to any particular known flavor.” *Id.* at Subpart 9.3-1(b).

60. In its “Emergency Justification” and “Regulatory Impact Statement” published as part of the Emergency Rule, the Council stated that the Emergency Rule is necessary “to address the alarming increase of e-cigarette use among New York’s youth.” *Id.* at 4. The Council claimed that in a “survey of adolescent e-cigarette users in NYS, 46.3 percent preferred fruit flavors, followed by mint/menthol (19.9%) and chocolate, candy or other sweets (18.2%).” *Id.* at 6. The Council further claimed the same survey showed “27.3 percent of adolescent e-cigarette users say that flavors are the reason they currently use e-cigarettes, and for 19.3 percent of adolescent e-cigarette users, flavors were the primary reason for first use.” *Id.* The Council did

⁴ See New York Department of Health, Public Health and Health Planning Council, Documents for the September 17, 2019 Public Health and Health Planning Council Meeting, available at https://www.health.ny.gov/facilities/public_health_and_health_planning_council/meetings/2019-09-17/index.htm.

⁵ See “Prohibition on the Sale of Electronic Liquids with Characterizing Flavors” Subpart 9-3 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York, available at https://www.health.ny.gov/facilities/public_health_and_health_planning_council/meetings/2019-09-17/docs/title_10_nycrr.pdf; *De Palma Aff.* at Ex. A.

not state whether the survey considered adult vapor product users, what flavors they preferred, or the reason why they use or first used vapor products. Nor did the Council identify the reasons for current e-cigarette use reported by the remaining 72.7 percent of adolescents or the primary reason(s) for first use identified by the remaining 80.7 percent of respondents.

61. Despite asserting multiple claims regarding the supposed health risks of vapor products and “flavored” e-liquids, the Council provided little citation or evidentiary basis for its claims or statements, instead relying on unsupported conclusory allegations.

62. In the Emergency Rule, the Council also failed to provide any explanation for why the regular notice-and-comment rulemaking process was insufficient or why legislative action was not an option. On page 10 of the Emergency Rule, the only “alternative” to the action taken in the Emergency Rule that the Council identified is “to wait for the FDA to regulate in this area.” *Id.* at 10.⁶ The Council addressed this “alternative” by stating merely that “due to the health concerns associated with increased e-cigarette use among youths, this alternative was rejected.” *Id.* However, the Council’s suggestion that FDA regulation was the only “alternative” available to address illegal youth e-cigarette use is patently false. The State Legislature has the ability to enact statutory restrictions on the manufacture and sale of vapor products. Indeed, as noted above, in the last legislative session, the State Legislature actively considered, but then ultimately tabled, bills that would have imposed a ban on the sale of non-tobacco- and non-menthol-flavored vapor products.

63. Other than observing that users of vapor products can continue to access unflavored, tobacco-flavored, and menthol-flavored e-liquids, the Emergency Rule entirely fails to address the potential detrimental impact of the ban of “flavored” e-liquids on adult vapor

⁶ As described above, the Council’s suggestion that FDA has not taken any action to date to regulate vapor products is grossly incomplete at best and intentionally misleading at worst.

product users, including former smokers who rely heavily on such products, or the potential negative public health impact on these individuals of the sudden removal of all non-tobacco- and non-menthol-flavored e-liquids from the market.

64. On September 17, 2019, with less than 24 hours' notice, the Council held the above-described meetings at the four locations specified, with members of the public and from the vapor industry speaking out in large numbers against the Emergency Rule. Due to the number of individuals seeking to be heard, the Council ultimately limited the speakers to only one minute of time, with Council members repeatedly interrupting speakers to advise of the time restrictions. With only 24 hours' notice, the vapor industry and members of the public had virtually no opportunity to submit written comments to the Council. But even if they had, it likely would not have mattered as the Council voted immediately upon the conclusion of the speakers' comments.

65. Despite the overwhelming public opposition, and concerns voiced by dissenting Council member, Dr. Glenn Martin, that the Emergency Rule was being adopted without an actual emergency that warranted the emergency rulemaking process, the Council voted to adopt the Emergency Rule.

66. Governor Cuomo then announced that the Emergency Rule was effective immediately and that enforcement by Respondent New York State Police would begin October 4, 2019, with retailers who violate the flavor ban subject to penalties of up to \$2,000 per unit of flavored e-liquid that is possessed, manufactured, sold or offered for sale.⁷

⁷ Pres Release, *Governor Cuomo Announces New York State Implements First-in-the-Nation Ban on Flavored E-Cigarettes*, September 17, 2019, available at <https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-state-implements-first-nation-ban-flavored-e-cigarettes>.

VII. Enforcement of the Flavor Ban Will Require Virtually All Vape Shops and E-Liquid Manufacturers in the State to Shut Down, Resulting in the Immediate Closure of Almost 700 Businesses and Eliminating Over 3,100 Jobs.

67. Enforcement of the Emergency Rule will all but destroy the New York vapor products industry and put thousands of individuals immediately out of work. The vapor industry is a dynamic part of the U.S. economy, slightly larger than the national steel and iron forging industry and employs almost as many people as the commercial fishing industry. *See Dunham Aff.* at ¶ 5. In New York alone, the vapor industry accounts for over \$1,197,229,000 annually in economic output and generates jobs for approximately 8,110 individuals who collectively earn annual wages and benefits totaling \$508,872,500. *Id.*, ¶ 6.

68. The vapor industry in New York consists of 8 e-liquid manufacturers and 63 vape shop manufacturers, with a total of 694 vape shops statewide. *Id.*, ¶ 7. Together, these businesses employ 3,288 New Yorkers. *Id.* These figures do not include tobacco shops and other general retail outlets that sell vapor products as part of their broadest product offerings, nor do they include the wholesalers that distribute these products. *Id.* The vapor industry directly employs 4,416 people in New York, including 3,185 individuals employed by retail vape shops and another 103 individuals employed in the manufacturing of e-liquid. *Id.*, ¶ 8. The wages and benefits of these 3,288 individuals totals \$164,524,700 and the direct economic output attributable to retail vape shops and e-liquid manufacturing totals \$275,521,500. *Id.*

69. The vapor industry also contributes \$99,080,100 in New York state taxes and vapor product consumers generate an additional \$30,940,000 in sales taxes. *Id.*, ¶ 9. If not for the recent enactment of the Emergency Rule, and prohibition of non-tobacco and non-menthol e-liquid flavors, the vapor industry's tax contributions would increase even further because of a new 20 percent state excise tax on vapor products that will go into effect as of December 1, 2019. *Id.*; *see* N.Y. TAX LAW § 1181: "In addition to any other tax imposed by this chapter or

other law, there is hereby imposed a tax of twenty percent on receipts from the retail sale of vapor products sold in this state.”).

70. Most of the vape shops in New York are small businesses, with many having five or fewer employees. *See* Glauser Aff. at ¶ 6; Canastraro Aff. at ¶ 11. The vast majority of e-liquids distributed to vape shops in New York would qualify as “flavored e-liquid” under the Emergency Rule. *See* Glauser Aff. at ¶ 7 (“Of the e-liquid products that we have distributed to vape shops in the state of New York since January 1, 2018, some 90 percent are products that would qualify as “flavored e-liquid” under Section 9-3.1 of the emergency flavor ban regulation.”); Canastraro Aff. at ¶ 15 (“Approximately 90 percent of the e-liquid orders that [Benevolent Eliquids] receive[s] from other vapor businesses are for a non-tobacco-flavored e-liquid and less than 10 percent are for tobacco-flavored e-liquids.”). For many distributors and manufacturers, including Benevolent Eliquids, tobacco-flavored e-liquids account for less than 10 percent of their orders and sales. *Id.* These numbers are proportionate and reflective of the of the percentage of e-liquids sold to vapor consumers that are “flavored e-liquid” under the Emergency Rule. *See* Glauser Aff. at ¶ 8.

71. The New York vapor industry will be devastated once enforcement of the Emergency Rule begins on October 4, 2019, with nearly all vapor product businesses closing and laying off employees.

72. Indeed, Petitioners Benevolent Eliquids and Perfection Vapes will be forced to close immediately and lay off their employees if the Emergency Rule is not enjoined. Canastraro Aff. at ¶ 26.

73. The loss of income and closure of their businesses will result in defaults on leases and mortgages, which have been personally guaranteed by the owner. *Id.*, ¶¶ 27-28. Benevolent Eliquids and Perfection Vapes are not the exception, but rather the rule.

74. Almost all of the vape shop businesses in New York will have to immediately close their doors and lay off employees. *Id.*

75. As the vast majority of the vapor product orders and sales are for products considered “flavored e-liquid,” businesses in the vapor industry rely heavily on continued manufacture and sale of these products to survive. Glauser Aff at ¶ 9.

76. As vape shops are small businesses and so dependent on sales of “flavored e-liquid” vapor products, their sales of e-cigarette devices and tobacco- and menthol-flavored e-liquids alone will be insufficient to keep their businesses alive. *Id.*

77. Like Perfection Vapes, these businesses will be unable to afford their rents and mortgages, and bankruptcy will be a common recourse for many owners faced with personal exposure as they similarly had to personally guarantee leases. *Id.*

78. Aware of these consequences, some vapor product businesses already are relocating their businesses out of state and in the process closing their New York locations and laying off employees in advance of enforcement of the Emergency Rule.

79. This does not account for the impact on the additional thousands of New Yorkers who will suddenly find themselves without jobs as the New York vapor industry is shut down.

AS AND FOR A FIRST CAUSE OF ACTION
(Annulling the Emergency Rule and Declaratory Judgment that it is Ultra Vires and Unconstitutional under the New York State Constitution)

80. Petitioners repeat and reallege by reference each and every allegation contained in paragraphs 1 through 79 above with the same force and effect as if set forth fully herein.

81. New York’s separation of powers mandates “that the Legislature make the critical policy decisions, while the executive branch’s responsibility is to implement those policies.” *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 259, 114 N.E.3d 1032, 1040 (2018).

82. “Agencies, as creatures of the Legislature, act pursuant to specific grants of authority conferred by their creator.” *Shah*, 32 N.Y.3d at 260. “[I]n the absence of such delegation, the administrative action would constitute an unauthorized exercise of legislative power in contravention of the separation of powers doctrine.” *Nicholas v. Kahn*, 47 N.Y. 2d 24, 30, 389 N.E.2d 1086 (N.Y. 1979). “If an agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers.” *Shah*, 32 N.Y.3d at 260. *See* NY Const., art III, § 1; *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976).

83. “Because of the constitutional provision that the legislative power of this State shall be vested in the Senate and the Assembly, the Legislature cannot pass on its law-making functions to other bodies but there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature.” *Boreali v. Axelrod*, 71 N.Y.2d 1, 10-11, 517 N.E.2d 1350, 1354-1355 (1987).

84. The legislative branch, and not the executive, is in the best position to weigh the concerns of affected businesses and the general public, and an administrative agency may not, without any legislative guidance, reach its own conclusions about the proper accommodation among those competing interests.

85. Respondents promulgated the Emergency Rule based on general authority under Public Health Law § 225 without any particular guidance directing promulgation of the

emergency rule and are not merely filling in the gaps of legislation. Rather the Emergency Rule is a profound change in social and economic change that affects millions of New Yorkers' daily lives.

86. The Legislature has considered the alleged problem and continues to debate the appropriate remedy while enacting legislation to attempt to address the alleged problem of youth vapor product use.

87. When an administrative agency moves beyond enforcing policies enacted by the Legislature and enacts policy on its own accord, it is acting outside the scope of its authorized power.

88. Accordingly, Respondents promulgation of the Emergency Rule exceeded their statutory authority and usurped the Legislature's role in violation of the doctrine of separation of powers.

89. An actionable controversy of a justiciable nature exists between Petitioners and Respondents regarding whether Respondents' aforementioned conduct constitutes a violation of the SPA and, if so, the proper remedy therefor.

90. Respondents conduct is ongoing and immediate. As a result of Respondents' *ultra vires* actions in contravention to the established separation of powers under the New York Constitution, Petitioners are suffering ongoing and irreparable harm as compliance will cause them significant financial losses as well as business closures or face significant financial penalties for noncompliance.

91. Petitioners have no adequate remedy at law.

WHEREFORE, Petitioners request a temporary restraining order, a preliminary and permanent injunction, and a declaratory judgment:

- A. Declaring that Respondents' adoption and/or enforcement of the Emergency Rule constitutes an unlawful agency action in violation of the New York Constitution;
- B. Temporarily restraining Respondents from enforcing the Emergency Rule;
- C. Preliminarily and permanently enjoining Respondents from enforcing the Emergency Rule;
- D. Awarding Petitioners their costs and expenses;
- E. Awarding Petitioners their reasonable attorneys' fees as allowed by law; and
- F. Granting such further and other relief as is necessary and appropriate.

AS AND FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment that the Emergency Rule Is Arbitrary and Capricious)

92. Petitioners repeat and reallege by reference each and every allegation contained in paragraphs 1 through 91 above with the same force and effect as if set forth fully herein.

93. An administrative regulation will be upheld only if it has a "rational basis, and is not unreasonable, arbitrary or capricious." *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991); CPLR § 7803(3).

94. Agency rules "are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *N.Y. State Ass'n of Counties*, 78 N.Y.2d at 166.

95. The Emergency Rule is invalid because it does not have a rational basis, and is unreasonable, arbitrary or capricious.

96. Among other things, the Emergency Rule is unlawfully "arbitrary and capricious" because it allows for the continued sale of combustible tobacco cigarettes—which are also illegally used by youth—while banning a significant swath of substantially less harmful vapor

products, while at the same time it excludes “menthol” flavored vapor products from the flavor ban.

97. Respondents claim that there “is . . . concern regarding human exposure to nicotine,” which is also delivered by combustible cigarettes.

98. The National Academies of Science, Engineering, and Medicine have found that “across a range of studies and outcomes, e-cigarettes pose less risk to an individual than combustible tobacco cigarettes,” and that there is “conclusive evidence that completely substituting e-cigarettes for combustible tobacco cigarettes reduces users’ exposure to numerous toxicants and carcinogens present in combustible tobacco cigarettes.”

99. Nevertheless, the Emergency Rule does not purport to ban the manufacture, possession, or sale of combustible cigarettes.

100. Similarly, despite the claim that the purpose of the flavor ban is to discourage youth use, the Emergency Rule excludes what Respondents cite as the second most preferred flavored among adolescent New York e-cigarette users—menthol. Respondents offer no explanation or justification for this exclusion.

101. The Emergency Rule’s flavor ban is also arbitrary and capricious because Respondents—to the extent they considered any scientific data at all—entirely failed to consider an important aspect of the problem.

102. “An agency decision is arbitrary and capricious when the agency has relied upon factors which the legislature had not intended it to consider, entirely failed to consider an important aspect of the problem, ‘offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” *O’Rourke v. City of N.Y.*, 2019 NYLJ LEXIS 2375,

*23 (Sup. Ct. Kings Cnty. 2019) (quoting *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 407 (6th Cir. 2013) (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658, 168 L. Ed. 2d 467 (2007))); *Matter of Hilbertz v. City of New York*, 64 Misc. 3d 697, 727, 98 N.Y.S.3d 776, 800 (Sup. Ct., Kings Cnty. 2019); *see also Cnty. of Westchester v. United States HUD*, 802 F.3d 413, 431 (2d Cir. 2015); *Matter of Caspian Realty, Inc. v. Zoning Bd. Of Appeals, Town of Greenburgh*, 68 A.D.3d 62, 70-71, 886 N.Y.S.2d 442, 449 (2d Dep't 2009).

103. As noted by the extensive scientific evidence cited by the VTA in its Flavors ANPRM Comments (Abboud Aff. at Ex. 3), many adult ex-smokers rely heavily on flavored vapor products to break their dependence from combustible cigarettes and run a significant risk of returning to smoking when those flavors are removed from the market, thereby causing a significant detrimental impact to public health.

104. Nonetheless, the Emergency Rule contains absolutely no evidence of any consideration by Respondents of this “important aspect of the problem” associated with flavored vapor products.

105. Respondents' conduct is ongoing and immediate. As a result of Respondents' arbitrary and capricious actions, Petitioners are suffering ongoing and irreparable harm as compliance will cause them significant financial losses as well as business closures or face significant financial penalties for noncompliance.

106. Petitioners have no adequate remedy at law.

WHEREFORE, Petitioners request a temporary restraining order, a preliminary and permanent injunction, and a declaratory judgment:

A. Declaring that Respondents' adoption and/or enforcement of the Emergency Rule is arbitrary and capricious;

- B. Temporarily restraining Respondents from enforcing the Emergency Rule;
- C. Preliminarily and permanently enjoining Respondents from enforcing the Emergency Rule;
- D. Awarding Petitioners their costs and expenses;
- E. Awarding Petitioners their reasonable attorneys' fees as allowed by law; and
- F. Granting such further and other relief as is necessary and appropriate.

AS AND FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment that Respondents Have Violated the State Administrative Procedure Act)

107. Petitioners repeat and reallege by reference each and every allegation contained in paragraphs 1 through 106 above with the same force and effect as if set forth fully herein.

108. As state agencies and actors, Respondents are subject to the requirements of the State Administrative Procedure Act ("SAPA"), including the notice and comment requirements imposed by SAPA § 202.

109. Pursuant to SAPA § 202, Respondents must fulfill minimum notice-and-comment requirements, including publishing the proposed rules sufficiently in advance to allow interested parties to comment on the proposed rulemaking.

110. However, "if an agency finds that the immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare and that compliance with the requirements of subdivision one of this section would be contrary to the public interest, the agency may dispense with all or part of such requirements and adopt the rule on an emergency basis." SAPA § 202(6)(a).

111. The agency seeking emergency rule adoption must fully articulate in writing "an explanation of why compliance with the requirements of subdivision one of this section would be

contrary to the public interest; and an explanation of why the current circumstance necessitates that the public and interested parties be given less than the minimum period for notice and comment provided for in subdivision one of this section.” SAPA § 202(6)(d)(iv).

112. Respondents did not provide adequate opportunity for notice-and-comment and failed to satisfy the notice-and-comment requirements under the SAPA.

113. Respondents further failed to satisfy the requirements for promulgation of an emergency rule under the SAPA.

114. Respondents also failed to consider all aspects and factors in the supposed problem in promulgating and preparing the Emergency Rule.

115. An actionable controversy of a justiciable nature exists between Petitioners and Respondents regarding whether Respondents’ aforementioned conduct constitutes a violation of the SAPA and, if so, the proper remedy therefor.

116. Respondents conduct is ongoing and immediate. As a result of Respondents’ actions in violations of the SAPA, Petitioners are suffering ongoing and irreparable harm as compliance will cause them significant financial losses as well as business closures or face significant financial penalties for noncompliance.

117. Petitioners have no adequate remedy at law.

WHEREFORE, Petitioners request a temporary restraining order, a preliminary and permanent injunction, and a declaratory judgment:

A. Declaring that Respondents’ adoption and/or enforcement of the Emergency Rule constitutes an unlawful agency action in violation of the State Administrative Procedure Act;

B. Temporarily restraining Respondents from enforcing the Emergency Rule;

C. Preliminarily and permanently enjoining Respondents from enforcing the Emergency Rule;

D. Awarding Petitioners their costs and expenses;

E. Awarding Petitioners their reasonable attorneys' fees as allowed by law; and

F. Granting such further and other relief as is necessary and appropriate.

AS AND FOR A FOURTH CAUSE OF ACTION
(Temporary, Preliminary and Permanent Injunction
Against Enforcing the Emergency Rule)

118. Petitioners repeat and reallege by reference each and every allegation contained in paragraphs 1 through 117 above with the same force and effect as if set forth fully herein.

119. The Court is empowered by CPLR § 6301 to grant a preliminary injunction where: "it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the Plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual."

120. A temporary restraining order and preliminary injunction should be granted upon a showing that (1) the petitioner is likely to succeed on the merits; (2) the petitioner will be irreparably injured absent the injunctive relief; and (3) the balance of equities weigh in the petitioner's favor. *See, e.g., Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48, 49 (2005); *Bernheim v. Matthew Bender & Co.*, 244 A.D.2d 161, 663 N.Y.S.2d 577 (1st Dep't 1997).

121. For all the reasons set forth above, and in further detail in the accompanying Memorandum of Law and supporting Affidavits, Petitioners respectfully submit that they have a strong likelihood of success on the merits of the action, will be irreparably injured absent injunctive relief, and the balance of equities weigh in their favor.

122. Petitioners have no adequate remedy at law.

WHEREFORE, Petitioners request a temporary restraining order, and a preliminary and permanent injunction, and a declaratory judgment:

- A. Temporarily restraining Respondents from enforcing the Emergency Rule;
- B. Preliminarily and permanently enjoining Respondents from enforcing the Emergency Rule;
- C. Awarding Petitioners their costs and expenses;
- D. Awarding Petitioners their reasonable attorneys' fees as allowed by law; and
- E. Granting such further and other relief as is necessary and appropriate.

CONCLUSION

WHEREFORE, Petitioners respectfully requests that this Court issue a Judgment and Order:

(i) declaring that Respondents have improperly enacted the Emergency Rule in excess of their constitutional, statutory and administrative authority;

(ii) annulling the Emergency Rule;

(iii) preliminarily, permanently and preliminarily enjoining and preventing Respondents from enforcing the Emergency Rule; and

(iv) granting to Petitioners such other and further relief as the Court may deem just and proper.

Dated: New York, New York
 September 24, 2019

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Vapor Technology Association,
Benevolent ELiquids Inc. and
Perfection Vapes, Inc.*

TO:

Respondent Andrew M. Cuomo
Office of the Governor of New York State
State Capitol Building
Albany, New York 12224;

Respondent New York Department of Health
Corning Tower, Empire State Plaza
Albany, New York 12237;

Respondent Howard Zucker, M.D.
Commissioner of The New York Department of Health
Corning Tower, Empire State Plaza
Albany, New York 12237

Respondent The Public Health and Health Planning Council
Corning Tower, Empire State Plaza
Albany, New York 12237

Respondent New York State Police
1220 Washington Avenue, Building 22
Albany, New York 12226

With copy to:

The Office of the Attorney General
Empire State Plaza, Justice Building, 2nd Floor
Albany, New York 12224

ATTORNEY'S VERIFICATION

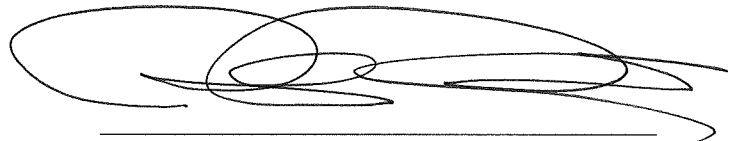
RICHARD DE PALMA, an attorney duly admitted to practice law in New York State states:

1. That I am a partner with the law firm of THOMPSON HINE LLP, attorneys for Vapor Technology Association, Benevolent ELiquids Inc. and Perfection Vapes, Inc. in the within action.

2. I have read the foregoing Verified Petition and the matters stated therein are true to my knowledge, except as to matters alleged on information and belief, and as to those matters, I believe them to be true to the best of my knowledge.

3. This Verification is made by deponent and not by Petitioners because none of Petitioners reside or maintain a principal office within New York County, the County where I have my office.

Dated: New York, New York
September 24, 2019

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a horizontal line.

RICHARD DE PALMA