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

NATIONAL RESTAURANT ASSOCIATION,

Plaintiff-Petitioner,

-against-

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

Defendants-Respondents.

Index No. _____

NOTICE OF VERIFIED ARTICLE 78 AND DECLARATORY JUDGMENT PETITION

PLEASE TAKE NOTICE that upon the annexed Verified Article 78 and Declaratory Judgment Petition, sworn to on December 3, 2015, the Affirmation of S. Preston Ricardo, Esq., dated December 3, 2015, with exhibits attached thereto, the Affidavits of Angelo I. Amador, dated December 3, 2015, Dr. David A. McCarron, MD, FACP, FAHA, dated December 3, 2015, with exhibits attached thereto, and Susan Finn, dated December 3, 2015, with exhibits attached thereto, and the accompanying Memorandum of Law in Support of Plaintiffs-Petitioner's Verified Article 78 and Declaratory Judgment Petition, dated December 3, 2015, an application will be made to this Court, by the undersigned attorneys for Plaintiff-Petitioner, at the Courthouse located at 60 Centre Street, New York, New York, in the Motion Support Courtroom – Submission Part, Commercial Division Calendar, Room 130, on **December 24, 2015** at 9:30 a.m., for an order and judgment pursuant to Articles 78 and 30 of the New York Civil Practice Law and Rules, granting the relief demanded in the Verified Article 78 and Declaratory Judgment Petition as follows:

(a) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing § 81.49 of the New York City Health Code, as purportedly amended by Defendant-Respondents in September 2015, on the basis that New York City Department of Health and Mental Hygiene ("DOH") had no authority to do so, declaring § 81.49 invalid;

(b) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing § 81.49 of the New York City Health Code, as purportedly amended by DOH in September 2015, on the basis that it was promulgated in violation of the separation of powers, and declaring that Sections 558, 556 and 1043(b) of the N.Y.C. Charter are unconstitutional because they violate the separation-of-powers doctrine to the extent they are found to have delegated and/or authorized Defendants-Respondents to promulgate § 81.49 of the New York City Health Code;

(c) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing § 81.49 of the New York City Health Code, as purportedly amended by DOH in September 2015, on the basis that it is unlawfully arbitrary and capricious, and declaring § 81.49 invalid;

(d) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing § 81.49 of the New York City Health Code, as purportedly amended by DOH in September 2015, on the basis that it violates the First Amendment of the Unites States Constitution, and declaring that § 81.49 is invalid on that basis;

(e) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing § 81.49 of the New York City

Health Code, as purportedly amended by DOH in September 2015, on the basis that, being inconsistent with federal labeling laws, is preempted under the Supremacy Clause of the United States Constitution and, therefore, of no force, and declaring that § 81.49, being inconsistent with federal labeling laws, is preempted under the Supremacy Clause of the United States Constitution and, therefore, of no force;

(f) Awarding Plaintiff-Petitioner costs and disbursements against Defendants-Respondents pursuant to CPLR § 8101; and

(g) Granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR § 7804(c), any answer and supporting affidavits shall be served and filed at least five (5) days before the return date of this application, and any reply shall be served and filed at least one day before the return date of this application.

PLEASE TAKE FURTHER NOTICE that New York County is designated as the venue of this Proceeding pursuant to CPLR §§ 506(b) and 7804(b) as it is the County in which the material events giving rise to this Proceeding took place.

Dated: New York, New York
December 3, 2015

Respectfully submitted,

GOLENBOCK EISEMAN ASSOR
BELL & PESKOE LLP

By: /s/
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SUPREME COURT OF THE STATE OF NEW YORK
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VERIFIED ARTICLE 78 &
DECLARATORY JUDGMENT PETITION

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Plaintiff-Petitioner, by and through its undersigned counsel, respectfully alleges as follows:

PRELIMINARY STATEMENT

1. The New York City Board of Health's (the "Board") new sodium regulation that went into effect on December 1 does not help consumers make healthier and better informed decisions about sodium content when dining out at New York City restaurants. Once the rhetoric is cast aside, it becomes readily apparent that, ironically, this regulation will confuse and mislead consumers into potentially making less healthy food choices through the law's spotty, inconsistent application and inaccurate scientific distortions. The New York City Department of Health and Mental Hygiene ("Department of Health" or "DOH") makes it sound so simple: "This law will save lives." But it is rarely that simple, and that is especially true in the highly controversial and evolving scientific fray over sodium.

2. The federal government has acknowledged the critical nuances and complexities that the Board overlooks by adopting an approach to nutritional information that will truly be helpful. As set forth in anticipated new federal labeling laws due to be implemented next year, which Petitioner supports, certain chain restaurants will be required to provide consumers with information about an array of nutrients, including sodium, in a single uniform way that will give consumers a comprehensive and consistent standard to evaluate the nutritional values of their food. The New York City sodium regulation, by contrast, is about the Board – for the second time in three years – looking to grab headlines as the purveyor of "first in the nation" health initiatives, notwithstanding that, in truth, its sodium regulation is illogical, unlawful, and more likely to mislead consumers about sodium health than help them.

3. As with the Board's attempt to pass the "Soda Ban" in 2012 – which, in the name of addressing obesity, prohibited sales of sugary beverages in cups larger than 16 ounces, and

was immediately struck down in court – here again the Board has acted without any legislative guidance, and improperly sidestepped the people's representatives at the City Council, in an effort to hold themselves out as trailblazers.

4. The regulation, like the Soda Ban before it, is completely arbitrary in its scope, reach, and application. And this time the Board's action is worse. It not only acted without authority and in a completely arbitrary fashion, but has launched into a scientific debate at a time when it has never been more controversial by requiring certain New York City restaurants to communicate on their menus a "warning" (which is really a preempted "health claim" and "nutrient claim") crafted by the Board that takes a position about the health effects of a specified level of sodium consumption and with which many of the covered restaurants disagree. This regulation does not achieve the laudable objective of enabling consumers to make appropriate food choices with respect to sodium content, and should be struck down.

5. At issue is a new amendment to New York City's Health Code that requires certain food service establishments ("FSEs")[1] to change their menus in two ways (the "Sodium Mandate"): first, by posting a salt-shaker symbol next to food items that contain 2,300 milligrams or more of sodium; and second, by posting a health "Warning" for food items that contain the specified amount of sodium, stating that "[h]igh sodium intake can increase blood pressure and risk of heart disease and stroke."[2]

[1] FSEs are defined under the New York City Health Code as "a place where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle." R.C.N.Y. tit. 24, § 81.03(s). FSEs include restaurants, delicatessens, fast-food restaurants, movie theatres, stadiums, and street carts.

[2] Notice of Adoption of Amendments to Article 81 of the New York City Health Code (2015) at 4 (Affirmation of S. Preston Ricardo ("Ricardo Aff."), Ex. A) ("Notice of Adoption"). Unless otherwise noted, all Exhibits referenced herein are exhibits to the Ricardo Affirmation.

6. The Sodium Mandate applies only to FSEs in New York City that are part of chains with 15 or more locations ("Covered Establishments"). Other food vendors, such as independent restaurants and most delicatessens, and all grocery stores and convenience stores, are exempt, notwithstanding that they sell the same foods and foods with the same or higher sodium content.

7. With the Sodium Mandate, the Board has required the disclosure of just enough inaccurate and controversial information about sodium in certain food items to cause far reaching negative consequences rather than help consumers and reduce public health risks. The Board has rushed to action at a time when the dated scientific underpinnings for the Board's decisions about who will benefit and who will be burdened by its regulatory scheme are more questionable than ever and subject to serious controversy in medical journals and national newspapers alike.

8. In a case study of renegade regulating at its worst, the Board has adopted a law that suffers from a startling number of legal deficiencies. Written in convoluted ways to try to dodge new wide-ranging federal legislation which will require certain restaurants to provide their customers with broad-based nutritional information about restaurant food (including sodium content), while at the same time trying to avoid all of the pitfalls of the Soda Ban, the result is a completely irrational law that does not accomplish its goal of enabling consumers to make wise choices with respect to sodium, and at the same time, may put some consumers in harm's way. In the process, the Sodium Mandate harms some businesses and benefits others with no rational reason to do so.

9. Petitioner brings this hybrid Article 78 action seeking an order enjoining Respondents from implementing and enforcing the Sodium Mandate and a declaration that it is invalid on several grounds.

10. First, Petitioner seeks a determination that Respondents, in adopting the Sodium Mandate, violated settled principles of separation of powers. The Board acted without legislative guidance and assumed the role of a legislative, policy-making body in violation of the separation of powers. Respondents also wrote on a clean slate and arrogated to themselves the legislative power to decide what measures should be taken by the government to address cardiovascular disease through the regulation of sodium – despite multiple legislative efforts that have failed to adopt a sodium policy. Laden with exceptions and exclusions, the Sodium Mandate draws lines, and picks among business winners and losers, based transparently on economic and social concerns – matters that are beyond the province of the Board's interstitial rulemaking authority, and for which the Board used no special expertise or technical competence.

11. Second, Petitioner seeks a determination that the Sodium Mandate is arbitrary and capricious based on its illogical application to only some food vendors and not others, and to only some menu items but not others. The result in a non-sensical scheme that is wholly unrelated to, much less one that materially and directly advances, the purported purpose of the regulation.

12. Third, Petitioner seeks a determination that the Sodium Mandate violates Petitioner's members' First Amendment rights. Far from merely requiring Covered Establishments to post purely factual and uncontroversial information, with the Sodium Mandate, Respondents are compelling Covered Establishments to use their menus to communicate the Board's scientifically controversial opinion, with which many Covered Establishments disagree. Further, the Sodium Mandate does not directly and materially advance Respondents' interest in reducing cardiovascular disease, and contains so many exemptions that

the objective is not advanced. The regulation is also far broader than necessary to accomplish the asserted interests.

13. Fourth, Petitioner seeks a determination that the Sodium Mandate is a "health claim" and/or a "nutrition content claim", and is thus preempted by federal law. The Nutrition Labeling and Education Act ("NLEA") expressly prohibits localities from requiring such claims that are not identical to the regulatory requirements of federal law. Because the Sodium Mandate requires a health claim and nutrition content claim on food labeling that has not been authorized by the FDA and differs from the requirements of the NLEA, the Sodium Mandate is expressly preempted.

14. Petitioner respectfully requests a decision from this Court by February 1, 2016, so that affected business can avoid, to the extent possible, expending funds to comply with a law that Petitioner asserts should be struck down. Penalties are scheduled to go into effect on March 1, 2016, and Petitioner's members will need to take advance action (and are already taking action) to comply and avoid such penalties and the ire of the DOH.

PARTIES

15. Plaintiff-Petitioner, the National Restaurant Association ("Petitioner" or "Association") is the leading business association for the restaurant and food service industry, which is comprised of one million restaurants and foodservice outlets employing 14 million people. The Association represents about 500,000 member restaurant establishments. Over half of food service establishments in New York City with more than 15 locations nationwide – the target of the Sodium Mandate – are members of the Association ("Covered Members").

16. Defendant-Respondent the New York City Department of Health and Mental Hygiene is an administrative agency in the executive branch of the New York City government.

The Department of Health includes Defendant-Respondent New York City Board of Health, which is comprised of eleven individuals appointed by and serving at the pleasure of the Mayor pursuant to Sections 551 and 553-54 of the N.Y.C. Charter.

17. Defendant-Respondent Dr. Mary Travis Bassett is Commissioner of the New York City Department of Health and Mental Hygiene, and serves as Chair of the Board of Health.[3]

HARM TO PLAINTIFF-PETITIONER

18. The vast majority of Covered Members are franchisees. These franchisees are often small business owners.

19. If required to comply with the Sodium Mandate, Covered Members will be harmed, and irreparably harmed, in numerous ways. First, courts presume irreparable harm when a party will suffer injury from a constitutional violation. That is the case here, because the Sodium Mandate compels speech by Covered Members in violation of their First Amendment rights and violates the separation of powers doctrine. Covered Members are being forced to revise their menus and signage and to start using those items with the requisite revised speech – with which many of them disagree – in commerce before the Court decides the ultimate merits of the case. Because compliance with the Sodium Mandate for even one day would result in a loss of First Amendment rights, that enforcement constitutes *per se* irreparable injury to the Covered Members. Harm from the misuse of Respondents' regulatory power, in violation of the separation of powers doctrine, also constitutes irreparable harm.

20. The Sodium Mandate will cause Covered Members to lose customer goodwill and to suffer from damage to their business reputations. Each of these damages constitutes

[3] The DOH, the Board, and Commissioner Bassett shall collectively be referred to herein as "Respondents."

irreparable harm as a matter of law because these losses are impossible or very difficult to quantify. The arbitrary nature of the Sodium Mandate will not only create uncertainty among Covered Members' customers, it will also interject an element of unjustified fear, which will have the combined effect of discouraging consumers from purchasing the Covered Members' products and driving people to patronize the more than 80% of restaurants that are not covered by the Sodium Mandate and that sell foods containing the same or higher amounts of sodium but do not have to flag their food items and disseminate Respondents' "Warning". Once customer loyalty is lost, it will be difficult to recover. Covered Members will therefore suffer irreparable and immediate injury with the regulation, as customers may take their business elsewhere if their desired food items are not available without the conspicuous Icon and accompanying Risk Statement.

21. Covered Members will suffer economic harm through the substantial time, resources and money that they would have to devote to complying with the Sodium Mandate and in preparing to comply with it. Such losses are irreparable, because the Covered Members have no recourse to recover their losses even if they prevail on the merits. These irreparable economic harms include incurring substantial costs associated with discarding menus and signage, incurring substantial costs associated with redesigning and producing new menus and signage, devising and implementing software changes for some of the Covered Members, and recurring training and education of staff about the meaning and content of the Sodium Mandate, as well as how to interact with DOH and customers about those and related compliance issues. If the Sodium Mandate is struck down, the Covered Members would then have to expend resources to undo those changes.

22. Covered Members' employees will need to expend time and energy on an ongoing basis due to employee turnover, the need to monitor and ensure continued compliance when food items (such as daily specials) and menus and signage change, and the necessary interaction with DOH in connection with any inspection and compliance issues.

23. Compliance is further complicated by the fact that the Sodium Mandate is being implemented at the same time that Covered Members are working to comply with the new federal menu labeling law, discussed below. As a result of both laws, the affected businesses will have to develop separate menus, menu boards and on-line menus for New York City than those that will be used in other locations.

JURISDICTION AND VENUE

24. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR § 7803 because the rule adopted by Respondents is a final determination made in violation of lawful procedure, affected by an error of law, and is arbitrary and capricious. This Court also has jurisdiction to render a declaratory judgment pursuant to CPLR § 3001.

25. This Court has personal jurisdiction over Petitioner pursuant to CPLR § 301.

26. This Court has personal jurisdiction over Respondents pursuant to CPLR § 302(a)(1).

27. Venue lies in New York County pursuant to CPLR §§ 506(b) and 7804(b) because it is where material events giving rise to the Sodium Mandate took place.

BACKGROUND

A. Respondents' Policy-Laden And Arbitrary "Soda Ban," Passed Under The Guise Of Addressing An Obesity Epidemic, Was Invalidated

28. On September 13, 2012, the Board attempted an end-run around the City Council by adopting a regulation that prohibited a subset of New York City's FSEs from

selling certain sweetened beverages in any cup or container that can hold more than 16 ounces (R.C.N.Y. tit 24 § 81.53, the "Soda Ban"). The Board's stated purpose of the Soda Ban was to "address the obesity epidemic among the City's residents."[4]

29. A group of business and trade associations commenced a legal challenge to the Soda Ban. The petitioners contended that, by adopting the Soda Ban, the Respondents[5] had violated the separation of powers by exceeding permissible agency rulemaking and usurping the role of the legislature. They also argued that the Soda Ban was arbitrary and capricious within the meaning of CPLR § 7803(3). In support of their latter point, the petitioners relied on the Soda Ban's myriad exceptions and loopholes that stripped it of a rational coherent operation and gutted its purpose of reducing the consumption of sugar sweetened beverages or combating obesity. These irrational exceptions and loopholes included:

a. Applying the Soda Ban to only some business establishments but not others, thereby allowing, for example, consumers to purchase a soda greater than 16 ounces from a corner bodega but not a restaurant located on the same block;

b. Excluding all alcoholic and other high-calorie-beverages, thereby forbidding, for example, a diner from selling a 20-ounce cola but not a large milkshake; and

c. Placing no restrictions on free refills or the number of 16-ounce beverages an individual consumer could buy at one time.

30. The New York Supreme Court declared the Soda Ban invalid based on both of the grounds that the petitioners had asserted. *See New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep't of Health & Mental Hygiene* ("Statewide Coalition"), 2013 WL 1343607, at *18, 20 (Sup. Ct. N.Y. Cty. Mar. 11, 2013). Without reaching petitioners' argument that the Soda Ban was unlawfully arbitrary, the First Department and the

[4] The City Record: Official Journal of the City of New York, Sept. 21, 2012, at 2602, Ex. G.

[5] The Commissioner at that time was Dr. Thomas Farley.

New York Court of Appeals affirmed the Supreme Court's ruling that the Soda Ban ran afoul of separation of powers principles. *Statewide Coalition*, 110 A.D.3d 1, 16 (1st Dep't 2013), *aff'd,* 23 N.Y.3d 681, 701 (2014).

B. The Board Adopts The Sodium Mandate, An Equally Arbitrary, Unprecedented Initiative That Goes Even Further By Compelling Covered Establishments To Post Controversial Health Claims About Sodium

31. In June 2015, Mayor Bill de Blasio and DOH announced a proposal to require a small subset of New York City's FSEs to post a "warning label" on food items containing 2,300 milligrams or more of sodium.[6] An article in the *Wall Street Journal* reported that "[o]pponents of New York City Mayor Bill de Blasio's proposal to require chain restaurants to post a warning label on salt-heavy foods said the plan is based on shaky science and will harm businesses already struggling to meet federal menu-labeling laws."[7]

32. On June 23, 2015, the Board published a Notice of Intention to amend Article 81 of the Health Code (set forth in title 24 of the Rules of the City of New York) to add § 81.49, the Sodium Mandate, in the City Record pursuant to §1043 (f) of the City Charter.[8] On July 29, 2015, written comments were submitted to the Board, and a public hearing was held that day. Petitioner submitted a written comment and testified at the public hearing.[9]

33. On September 9, 2015, the Board voted to add § 81.49, entitled "Sodium warning," to the New York City Health Code, with only minor changes from the June proposal.

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[6] *See* Michael M. Grynbaum, *De Blasio Administration Wants High-Sodium Warnings on Menus*, N.Y. Times, June 9, 2015, Ex. H.

[7] Melanie Grayce West, *Restaurants Pan New York City's Plan for High-Salt Labels* ("*NYC Plan for High-Salt Labels"),* Wall St. J., June 10, 2015, Ex. I.

[8] The City Record: Official Journal of the City of New York, June 23, 2015, at 2432-2434, Ex. J.

[9] *See* National Restaurant Association's Written Comment to Proposed Amendment to Sodium Mandate, ("Association Comment"), dated July 29, 2015, Ex. B.

In remarks that preceded its formal adoption, the Board's members touted the Sodium Mandate's originality, stating it would make New York City an "innovative leader"[10] in public health, and "the first jurisdiction to use a warning label on menus."[11]

34. The effective date was December 1, 2015, less than 3 months after the rule was adopted. On or about October 13, 2015, the Association and the New York State Restaurant Association reiterated their concerns to DOH about implementation of the Sodium Mandate, including concerns that failing to align the Sodium Mandate's rollout with the FDA's federal requirement for nutrient disclosure being implemented in 2016 (discussed further below), will "cause confusion for customers and economic costs for restaurants that [were then] working to comply with the FDA deadline" of December 1, 2016.[12] Although only 11 weeks' advance notice was provided before the regulation became effective – and notwithstanding the considerable burdens of compliance for Covered Establishments – in an October 28, 2015, response, Respondents largely dismissed these concerns and refused to postpone enforcement of the Sodium Mandate.[13]

[10] September 9, 2015 Meeting of the New York City Board of Health, Video Recording, *available at* http://www.nyc.gov/html/doh/html/about/public-meetings-archive.shtml.

[11] *Id.*

[12] Letter from Melissa Fleischut, President & CEO, New York State Restaurant Association, and Joan McGlockton, Vice President, National Restaurant Association, to Dr. Mary Travis Bassett, Commissioner, Department of Health and Mental Hygiene (Oct. 13, 2015), Ex. K.

[13] Letter from Dr. Mary Travis Bassett, Commissioner, Department of Health and Mental Hygiene, to Melissa Fleischut, President & CEO, New York State Restaurant Association, and Joan McGlockton, Vice President, National Restaurant Association (Oct. 28, 2015), Ex. L.

1. Respondents Adopted The Sodium Mandate Without Any Guidance From The City Council And In Disregard Of Multiple Legislative Efforts Regarding Sodium

35. The Sodium Mandate was drafted without any guidance or input from the City Council, and as an end run around multiple failed legislative efforts with respect to sodium regulation.

36. The Mayor's and Board's decision to circumvent the legislative process drew swift criticism from the City's Public Advocate: "We have seen this happen before with the failed soda ban. . . . The intention to improve health of New Yorkers is good. But the process is wrong. There is no reason not to send this through the elected City Council."[14]

37. No city or state law has prescribed a policy about the approach to sodium reduction efforts generally or for Respondents specifically to implement.

38. The Sodium Mandate concerns policy matters that have previously been raised before the City Council and the New York State Legislature. The City Council has twice considered and declined to adopt a proposal that would have placed an upper limit on the sodium content in kids' meals sold at fast-food restaurants.[15]

39. Numerous legislative initiatives aimed at limiting and/or warning consumers about sodium intake have also been introduced in the New York State Legislature, including one this year that essentially mirrors the Sodium Mandate:

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[14] Grynbaum, *supra* note 6, Ex. H.

[15] *See* New York City Council Introduction ("N.Y.C. Council Int.") No. 0530-2011, entitled *Setting Nutrition Standards for Distributing Incentive Items Aimed at Children ("2011 Healthy Happy Meals"),* Ex. M; N.Y.C. Council Int. No. 0442-2014, entitled *Setting Nutrition Standards for Distributing Incentive Items Aimed at Children ("2014 Healthy Happy Meals")*, Ex. N.

a. 2009 New York Assembly ("N.Y.A.") Bill No. S02824, requiring restaurants to post the sodium content by milligrams per serving on menus and/or menu boards.[16]

b. 2011 N.Y.A. Bill No. S02608, calling for a label and warning on certain packaged foods, including one or both of the following based on the level of sodium content: "high in sodium" or "highly salted". The Bill also would have required the following additional "warning statement" on foods with a higher sodium content: "[i]n some people a high salt (sodium) diet may contribute to high blood pressure."[17]

c. 2013 N.Y.A. Bill No. S02971, prohibiting the use of sodium by restaurants in the preparation of food.[18]

d. 2015 N.Y.A. Bill No. A08266, requiring certain "chain restaurants to place a salt-shaker-like symbol on menus with food items that contain more than two thousand three hundred milligrams of sodium" and the following statement on any menus which include a salt-shaker icon next to any food item: "such menu item contains more than 2,300 mg of sodium."[19]

40. After proceeding through the legislative process, none of these proposed Bills was adopted.

2. The Content And Ostensible Purpose Of The Sodium Mandate

41. Respondents' stated objective for the Sodium Mandate is to reduce the level of cardiovascular disease in New York City by regulating sodium. The Notice of Adoption states that there is a "continuous relationship between sodium and blood pressure – typically, the higher an individual's sodium intake, the higher the individual's blood pressure," and "hypertension, or high blood pressure, is a major risk factor for heart disease and stroke."[20] Thus, the stated purpose of the Sodium Mandate is as follows:

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[16] *See* N.Y.A. Bill No. S02824, dated March 4, 2009, Ex. O.

[17] *See* N.Y.A. Bill No. S02608, dated Jan. 26, 2011, Ex. P.

[18] *See* N.Y.A. Bill No. S02971, dated Jan. 28, 2013, Ex. Q.

[19] *See* N.Y.A. Bill No. A08266, dated June 16, 2015, Ex. R.

[20] Notice of Adoption at 1, Ex. A.

> It is imperative that consumers are readily able to identify menu items containing the recommended daily limit of 2,300 mg or more of sodium, because these items are clearly incompatible with recommendations regarding sodium consumption. The proposed consumer warning label will provide consumers with information about food items that contain exceedingly high sodium levels and will empower them to make well-informed decisions when making choices for themselves and their family members in the food retail environment.[21]

42. The Sodium Mandate applies only to Covered Establishments, *i.e.,* chain FSEs with 15 or more locations. In practice, more than 80% of New York City's restaurants, and more than 90% of food vendors, are *not* subject to the Sodium Mandate. The excluded vendors include, but are not limited to, independent restaurants, most delicatessens, chains with fewer than 15 locations, grocery stores, and convenience stores. The stated rationale for applying the Sodium Mandate solely to chain FSEs with 15 or more locations is that they "can easily make sodium information available."[22]

43. Under penalty of $200 fines that become enforceable on March 1, 2016, the approximately 17% of New York City's restaurants that are Covered Establishments must comply with the Sodium Mandate's two requirements. First, they must post the following salt-shaker symbol (the "Icon") on a menu or menu board next to any food item, or combination meal offered,[23] that contains more than or equal to 2,300 milligrams of sodium:

Second, Covered Establishments are required to post the following statement (the "Risk Statement") conspicuously at any place where a customer may order food:

[21] *Id*. at 2.

[22] *Id.*

[23] A "combination meal" is "a standard menu item that consists of more than one food item."

> Warning:  indicates that the sodium (salt) content of this item is higher than the total daily recommended limit (2,300 mg). High sodium intake can increase blood pressure and risk of heart disease and stroke.

3. The Illogical Scope And Reach Of The Sodium Mandate

44. The statute requires the Icon to appear next to any "menu item" that contains 2,300 mg or more of sodium, including combination meals. With respect to menu items that can be ordered with a variety of options, such as with different toppings or choices of side dishes, DOH advised that "if any option results in a combination meal with 2,300 mg of sodium or more, you must place the sodium warning icon next to the combination meal on the menu."[24] DOH has further advised that "[i]f any possible version of the item contains 2,300 mg of sodium or more, you must place the sodium warning icon next to the item on the menu."[25]

45. The fact that the Sodium Mandate applies only to menu items that exceed a specified threshold of sodium content leads to the inconsistent result that consumers purchasing the exact same food in the same restaurant receive different information depending on how they are posted: they receive a health "Warning" if they purchase a combination meal containing a cheeseburger and fries, but not if they purchase the exact same foods separately, because each item separately does not contain 2,300 milligrams of sodium.

46. Given DOH's guidance on how the regulation is to apply to foods offered with a variety of toppings or other options, consumers will routinely be warned against menu items for no reason: menu items will contain the Icon even though they often do *not* contain the amount of sodium that Respondents have selected as the demarcation line for the "Warning."

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[24] *See* DOH, "New Sodium (Salt) Warning Rule: What Food Service Establishments Need to Know," at 2 (emphasis in original), Ex. S.

[25] *Id.*

47. Furthermore, because the Sodium Mandate applies only to a subset of FSEs, which comprise only about 17% of New York City's 24,000 restaurants, and excludes all grocery stores, convenience stores, and bodegas, it does not apply to the vast majority of businesses that sell foods containing the specified, or higher, levels of sodium. A minority of food establishments will therefore be required to post the Icon and Risk Statement on menu items when other restaurants and food vendors on the same city block selling exactly the same meals (or meals with even higher sodium levels) have no such obligation.

48. The resulting economic burdens on Covered Establishments and the competitive advantage bestowed on the uncovered establishments has no justification, and the stated objective of informing consumers about high sodium meals is not met.

4. The Risk Statement Is Improperly Tied To A 2,300 mg Sodium Level And Reflects An Increasingly Controversial View About Sodium Consumption

49. At issue is not regulating or warning about a toxic substance, such as lead paint. It is about sodium, a nutrient essential to human health.[26]

50. Through the Risk Statement, the Sodium Mandate requires Covered Establishments to convey Respondents' highly debated view about the health effect of consuming a food containing more than 2,300 milligrams of sodium. Menu items that exceed 2,300 milligrams of sodium must be flagged with the Icon directing consumers to the Risk Statement. The word "Warning" is required at the outset of the Risk Statement. The "Warning" tells consumers that the amount of sodium in the menu item exceeds the "total daily recommended limit (2,300 mg). High sodium intake can increase blood pressure and risk of heart disease and stroke." The message of the Risk Statement is clear: "Beware: there is a

[26] Affidavit of Susan Finn ("Finn Aff.") ¶ 7.

material risk that sodium intake above 2,300 mg daily will increase blood pressure or cause a heart attack or stroke." It is directed at all customers, and is expressly intended to influence the customer's choices, regardless of their intake of sodium over time or their individual medical conditions.

51. The sole authority that Respondents purport to rely on for the Sodium Mandate is the federal 2010 Dietary Guidelines for Americans (the "Guidelines").[27] In doing so, however, Respondents distort the meaning of the 2,300 mg figure in the Guidelines and ignore five years' worth of scientific advances since those Guidelines were published.

52. The 2,300 mg figure for sodium is what is known as a "tolerable upper intake level," or "UL," for sodium. By definition, the UL means that intake of 2,300 mg/day will *not* cause an adverse health risk for most people.[28]

53. Unlike how Respondents use the figure, ULs are not intended to be benchmarks for optimal levels of nutrients in individual foods. Rather, ULs are designed to address the amount of a nutrient consumed over long periods of time for the purpose of determining healthy eating habits.[29]

54. UL's cannot be viewed as quantitative triggers for the risk of adverse health consequences.[30] Indeed, establishment of a UL does not address the level of risk, if any, associated with consuming the nutrient in amounts above the UL. Whether and to what extent consumption above that level puts any individual at risk of adverse health depends, among other

[27] *See* Notice of Adoption at 1, Ex. A, *citing* U.S. Dep't of Agriculture & U.S. Dep't of Health & Human Services, Dietary Guidelines for Americans, 2010 at 23 (2010).

[28] Association Comment at 5; Finn Aff. ¶ 16; Affidavit of David McCarron, M.D. ("McCarron Aff.") ¶ 10.

[29] Finn Aff. ¶ 17.

[30] *Id*. ¶ 18.

things, on their overall eating habits (including sodium consumption) over time and their individual health conditions.[31] Many individuals routinely consume far more than 2,300 milligrams of sodium daily on average with absolutely no adverse health risk whatsoever.[32] A UL simply is not a recommended "limit" above which consumers are in danger of adverse health effects.[33]

55. Respondents effectively misappropriate the scientifically-derived UL for a novel purpose that bears no relationship to its intended use in guiding dietary intake over time. With the Risk Statement, Respondents are using the UL as a threshold above which there *is* likely to be increased adverse health risks to consumers. That is not the meaning of the sodium UL. And its use in this way fails to take into account the medical conditions and overall eating habits of consumers. The required "Warning" statement thus provides inaccurate information to the general population of restaurant customers, and far from warning them of a danger, does them a disservice.[34]

56. The Sodium Mandate is an ill-conceived attempt to regulate public health based on a misunderstanding (and misuse) of the UL concept.

57. Respondents have ventured into the arena of sodium science just as the subject is at the height of controversy. In recent years, the issue of appropriate levels of sodium intake and the health impacts of consumption have become so controversial that the debate is "among the most contentious in the field of nutrition. . . ."[35]

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[31] *Id.*

[32] *Id.*

[33] *Id*. ¶¶ 15-20.

[34] Association Comment at 6-7; Finn Aff. ¶¶ 21-23.

[35] *See* Peter Whoriskey, *Is the American Diet Too Salty? Scientists Challenge the Longstanding Government Warning*, Wash. Post, April 6, 2015, Ex. T.

58. Several significant studies reported by the New England Journal of Medicine, the Institute of Medicine, and other medical journals in 2013 and 2014 undermine the view that consumption above the 2,300 mg UL, even on a long term basis, has any adverse consequences for the general population. They also show that consumption at far higher levels, such as 3,000 to 5,000 mg/day, are likewise not associated with adverse cardiovascular effects.[36]

59. These studies further establish that sodium and blood pressure do not correlate on a straight line basis as Respondents contend, but instead have a bell-curve relationship such that too little salt – defined as less than 2800-3000 mg/day – is as dangerous as too much, defined as two to three times Respondents' maximum "limit" of 2,300 milligrams.[37]

60. These studies have led to tremendous public debate in New York City and nationwide about the accuracy of the very dietary guidelines on which Respondents purport to rely for the Sodium Mandate. As evidence of the extent to which the appropriate level of sodium consumption has entered the public discourse, multiple articles and editorials have appeared in the New York Times, The Wall Street Journal, the Washington Post, and other publications in 2014 and 2015 reporting on these various studies and debating the alleged benefits of low sodium touted in the Guidelines.[38]

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[36] Association Comment at 3, *citing* Institute of Medicine, Sodium Intake in Populations: Assessment of Evidence, May 2013, *available at* http://iom.nationalacademies.org/Reports/2013/Sodium-Intake-in-Populations-Assessment-of-Evidence.aspx Graudal, et al., *Compared with usual sodium intake, low- and excessive-sodium diets are associated with increased mortality: a meta-analysis*, 27 Am. J. Hypertension 1129 (2014), Ex. U; Andrew Mente, et al., *Association of Urinary Sodium and Potassium Excretion with Blood Pressure*, 371 New England J. Med. 601 (Aug. 14, 2014), Ex. V; Affidavit of David A. McCarron ("McCarron Aff.") ¶¶ 10-24, 28; Finn ¶ 24; *see supra* note 39, Ex. Z at 10-11 and AA.

[37] *See* Association Comment at 3; McCarron Aff. ¶¶ 29-34; Finn Aff. ¶ 24.

[38] *See* Whoriskey, *supra* note 35, Ex. T (summarizing recent published studies and quoting commentators from both sides of the debate); Editorial, *The Debate on Salty Foods, Continued*, N.Y. Times, Aug. 23, 2014, Ex. W (noting that "[f]or years, there have been contentious debates over reducing the amount of salt in the American diet," and that new "warring studies in The New England Journal of Medicine" have added to the debate and unresolved questions); Editorial, *The Salt Libel, Another Example That Scientific Debates Are Rarely "Settled,"* Wall St. J., Aug. 18, 2014, Ex. X ("We were told the science was settled.

61. This year, as a result of these studies, the Academy of Nutrition and Dietetics ("AND"), the largest and most established nutrition organization in the United States, has urged the federal government to revise the guidelines on sodium based on this latest research. In doing so, AND notes the "distinct and growing lack of scientific consensus on making a single recommendation for all Americans" with respect to sodium, and a "growing body of research suggesting that the low intake levels recommended [in the Guidelines] are actually associated with increased mortality for healthy individuals."[39]

62. With the Sodium Mandate, Respondents are requiring Covered Establishments to publicize to their customers a controversial opinion about the purported health risks of a particular level of sodium intake at a time when sodium science is in a tremendous state of flux.

C. The Convoluted Sodium Mandate Resulted From Respondents' Desire To Circumvent The FDA's Requirements For Uniform Labeling Of Nutrients At Restaurants

63. On December 1, 2014, the Food and Drug Administration ("FDA") published a final rule entitled, "Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments."[40] This rule implemented the national menu labeling provisions of section 4205 of the 2010 Patient Protection and Affordable Care Act (the "Federal

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Yet new research suggests that salt is not nearly as dangerous as the government medical establishment has been proclaiming for many decades – and a low-salt diet may itself be risky."); Ron Winslow, *Low-Salt Diets May Pose Health Risks, Study Finds* ("Winslow Article"), Wall St. J., Aug. 14, 2014, Ex. Y ("A long-running debate over the merits of eating less salt escalated Wednesday when one of the most comprehensive studies yet suggested cutting back on sodium too much actually poses health hazards.").

[39] Finn Aff. ¶ 24; *See* Letter from Alison Steiber, Chief Science Officer, and Pepin Andrew Tuma, Director, Regulatory Affairs, Academy of Nutrition and Dietetics to Hon. Sylvia M. Burwell, Secretary of Health and Human Services, and Hon. Thomas J. Vilsack, Secretary of Agriculture (May 8, 2015), Ex. Z, 10-11; Press Release from Academy of Nutrition and Dietetics Commends Strong Evidence-Based Dietary Guidelines Report, dated May 14, 2015, Ex. AA.

[40] *See* Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Calorie Labeling of Articles in Food Vending Machines; Final Rule, 79 FR 71156 (Dec. 1, 2014); 21 C.F.R. 101.11.

Menu Law").[41] The Federal Menu Law's original compliance date was December 1, 2015. On July 9, 2015, however, as a result of extensive dialogue with restaurants concerning how to implement the rule and the difficulties of complying with it, the FDA extended the compliance date by one year to December 1, 2016.[42]

64. The Federal Menu Law requires, among other things, that restaurants and similar retail food establishments with 20 or more locations provide sodium and other nutritional information for standard menu items in a uniform manner. Covered establishments must (1) post the calorie content of standard menu items on the menu and/or menu boards; (2) make other nutritional information (including sodium content in milligrams)[43] available in writing to customers upon request; and (3) post a statement on menu and/or menu boards about the availability of such additional written nutrition information.

65. Congress enacted these requirements in order to provide accurate, clear and consistent information that would enable customers to make informed and healthful dietary choices by ensuring the availability of complete nutritional information. In fact, the FDA rejected the notion of isolating certain nutrients and highlighting risks associated for certain customers (including risks associated with sodium).[44]

66. The Association is fully supportive of the federal law, and its members have been working for months in preparation for compliance.

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[41] Pub. L. No. 111-148 4205 (2010).

[42] *See* Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date, 80 FR 39675-01 (July 10, 2015).

[43] Covered restaurants must make the following nutritional information available: total calories, calories from fat, total fat, saturated fat, trans fat, cholesterol, sodium, total carbohydrates, fiber, sugars, and protein.

[44] 79 Fed. Reg. 71156, 7123 (Dec. 1, 2014) (FDA Comment 102).

67. In passing the Federal Menu Law, Congress also recognized that the former patchwork of state and local requirements to post calories and other nutritional information on menus and menu boards was confusing to consumers, inefficient, and costly to the industry.[45] To eliminate these problems, Congress expressly adopted a federal preemption provision, which was originally enacted in 1990 as part of the NLEA, prohibiting state and local governments from enacting menu labeling requirements that are not identical to those contained in the Federal Menu Law.[46]

68. Respondents were well aware of the arbitrary outcomes that result from attaching the Icon and Risk Statement only to food items that exceed a certain sodium threshold. Indeed, one of the Board members expressly questioned the Sodium Mandate's requirement that an Icon be listed on items 2,300 milligrams or over, while a customer may order two items (without Icons) and unknowingly exceed 2,300 mg.[47] However, a Board member made clear that the Sodium Mandate was being crafted in an effort to circumvent preemption by the Federal Menu Law: the "[Board] can't do labeling, requiring sodium content on the menu" because of the Federal Menu Law, "but [the Board does] have authority to do a warning."[48]

69. Respondents, in their fervor to break new ground, and unable to devise a logical means of advising consumers about sodium intake in a way that was not preempted by federal law, adopted the Sodium Mandate despite its known, illogical features, and without any debate about the science they were relying on for their so-called "warning."

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[45] *See, e.g.,* 155 Cong. Rec. E587 (daily ed. March 9, 2009) (statement of Representative Jim Matheson).

[46] Any state or local regulation which would require covered restaurants to list sodium content of menu items on menus would be invalid based on the preemption, unless the FDA provided an exemption. New York City would have to apply to the FDA for an exemption from preemption, which it has not done.

[47] June 10, 2015 Meeting of the New York City Board of Health, Video Recording, *available at* http://www.nyc.gov/html/doh/html/about/public-meetings-archive.shtml.

[48] *Id.*

FIRST CAUSE OF ACTION

(Request for Relief under Article 78 of the CPLR)

70. Petitioner incorporates by reference the allegations set forth in paragraphs 1 to 69 of this Petition as if fully set forth herein.

71. Pursuant to Article 78 of the CPLR, administrative agency regulations and rules should be deemed invalid and enjoined from implementation as a violation of the separation of powers where "the body or officer proceeded, is proceeding or is about to proceed without or in excess of its jurisdiction" and/or "a determination was … affected by an error of law … or an abuse of discretion." *See* CPLR 7803(2)-(3), 7806; *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep't of Health & Mental Hygiene,* 23 N.Y.3d 681 (2014); *Boreali v. Axelrod*, 71 N.Y.2d 1, 14 (1987).

72. Executive agency regulations promulgated "without or in excess of [an agency's] jurisdiction" as outlined in Article 78 of the CPLR usurp powers reserved for the legislature, and are invalid as a violation of the separation of powers doctrine.

73. As an administrative agency in the City's executive branch, Respondents' authority is strictly limited to regulation and does not encompass legislative powers. The power to legislate in New York City is reserved expressly for the City Council. *See* N.Y. Const. art. IX, § 1(a); Charter ch. 2, § 21. Pursuant to the separation of powers, the executive branch and its administrative agencies may not unlawfully infringe upon the legislature's powers. Charter, ch. 1, § 3; *Statewide Coalition*, 23 N.Y.3d at 696.

74. While the City Council may delegate authority to the Respondents through legislation, it may not abdicate its "policy-making" authority. The Respondents' authority is limited to the power to "make rules" to "carry out the powers and duties delegated to it by or

pursuant to federal, state or local law." Charter §§ 1042-43. The Respondents may not use their grant of regulatory authority as a license to correct whatever social evils they perceive, because "[i]t is the provenance of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." *Boreali,* 71 N.Y.2d at 13.

75. The Court of Appeals' decision in *Boreali* provides the framework for evaluating whether an agency has engaged improperly in policy-making. 71 N.Y.2d at 11. The *Boreali* court identified the following four factors that "when viewed in combination, paint a portrait of an agency that has improperly assumed for itself, the open-ended discretion to choose ends" (1) whether the regulations were issued on a "clean slate" without legislative guidance; (2) whether they concern issues on which the legislature has tried – and failed – to reach agreement in the face of substantial public debate; (3) whether the agency operated outside of its proper sphere of authority by balancing competing social concerns in reliance solely on its own ideas of sound public policy; and (4) whether the regulations were not a product of "special expertise or technical competence." *Id.* at 11-14.

76. By adopting the Sodium Mandate, Respondents have attempted to address the "perceived social evil" of sodium intake through an impermissible transgression of their limited regulatory role. Applying the *Boreali* analysis to the Sodium Mandate, the Board exceeded its limited statutory authority and violated the separation of powers. *Boreali,* 71 N.Y.2d at 14.

77. First, the Board enacted the "innovative" and "groundbreaking" Sodium Mandate on a "clean slate" without the benefit of any legislative guidance concerning policy related to sodium reduction efforts. Without any such legislative guidance, the Board cannot exercise

sweeping power to create whatever rule it deems necessary to limit the consumption of sodium in New York as set forth in the Sodium Mandate.

78. The Respondents' broad grant of statutory authority in the Charter fails to provide any authority to enact the Sodium Mandate. That authority is limited as follows:

a. Section 1043(a) of the Charter authorizes administrative agencies in New York City to "adopt rules necessary to carry out the powers and duties" to the extent that they are "delegated to it by or pursuant to federal, state or local law."

b. Section 558(b) of the Charter authorizes DOH, through its Board, to periodically "add to and alter, amend or repeal any part of the health code."

c. Section 558(c) of the Charter provides that "[t]he board of health may embrace in the health code all matters and subjects to which the power and authority of the department extends."

d. Section 556(c) of the Charter provides that DOH may (1) "supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health," and (2) "supervise and regulate the food and drug supply of the city and other businesses and activities affecting public health in the city, and ensure that such businesses and activities are conducted in a manner consistent with the public interest and by persons with good character, honesty and integrity."

79. The Sodium Mandate impermissibly intervenes upon an area of substantial and unsettled public debate in the legislature. New York's City Council and State legislature have, on multiple occasions, considered and failed to pass legislation targeting sodium reduction. By enacting the Sodium Mandate in the face of the legislature's inability to agree on the goals and methods of sodium reduction policy, the Respondents exceeded the scope of their regulatory authority.

80. Respondents impermissibly operated outside their authority by balancing competing social and economic concerns in reliance solely on their own ideas of what the public policy with regard to sodium should be. *See Boreali,* 71 N.Y.2d at 12. The Sodium Mandate is

laden with exceptions, including but not limited to exceptions for only certain vendors and menu items, all of which demonstrate that Respondents engaged in legislative policy-making.

81. Respondents engaged in legislative policy-making by embarking into the controversial area of sodium health policy. By jumping into the sodium debate and enacting the Sodium Mandate, Respondents engaged in unauthorized legislative action.

82. Respondents impermissibly balanced various social, economic and health concerns in enacting the Sodium Mandate and applying the regulation to only a subset of food vendors and menu items.

83. The Sodium Mandate is not the product of the Respondents' special expertise or technical experience. The Board's decisions about where to draw the lines and distinctions contained within the Sodium Mandate were not based on any health expertise or expertise about sodium, but rather on other social and economic reasons having nothing to do with their expertise or any technical competence.

84. Because the Board has exceeded the scope of its regulatory authority by adopting the Sodium Mandate, the rule is invalid and its implementation must be enjoined.

85. Because Respondents do not have the authority to pass the Sodium Mandate, Respondents and their agencies, officers and employees should be restrained and enjoined from enforcing the Sodium Mandate pursuant to CPLR sections 7803 and 7806, and the Sodium Mandate should be declared invalid.

SECOND CAUSE OF ACTION

(Request for Declaratory Relief under Article 30 of the CPLR)

86. Petitioner incorporates by reference the allegations set forth in paragraphs 1 to 85 of this Petition as if fully set forth herein.

87. To the extent that this Court declines to interpret the Charter as precluding Respondents from enacting the Sodium Mandate, it should issue a declaratory judgment finding that such a broad delegation of authority pursuant to the Charter violates the separation of powers doctrine.

88. In accordance with this constitutional doctrine, the Respondents' authority is strictly limited to regulation and does not encompass legislative powers. The power to legislate in New York City is reserved expressly for the City Council. *See* N.Y. Const. art. IX, § 1(a); Charter ch. 2, § 21. Pursuant to the separation of powers, the executive branch "may not unlawfully infringe upon [those] legislative powers." Charter, ch. 1, § 3.

89. DOH and the Board, which are led by the Mayor's executive appointees, are "an arm of the executive branch." *Statewide Coalition,* 110 A.D.3d at 7; Charter ch. 1, §§ 6, 551, 553. As such, neither the Board nor DOH is treated as a "legislative body" by the Charter; instead, each is classified as an "agency" that can only "make rules" to "carry out the powers and duties delegated to it by or pursuant to federal, state or local law." Charter §§ 1042-43. The distinction between agency "rules" and local "laws" lies at the heart of the separation of powers in New York City because "[i]t is the provenance of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." *Boreali,* 71 N.Y.2d at 11-14.

90. Here, any purported authorization given to Respondents under the City Charter to Respondents to act in a core legislative capacity in promulgating the Sodium Mandate constitutes an unconstitutional delegation of the "fundamental policy-making responsibility" of the New York City Council, in violation of the separation of powers doctrine.

91. Accordingly, to the extent this Court finds that the Charter authorized Respondents to promulgate the Sodium Mandate, the Court should issue a declaratory judgment pursuant to CPLR 3001 finding these delegations to be unconstitutional as in violation of the separation of powers doctrine, and further that the Respondents' actions taken pursuant to them are invalid.

THIRD CAUSE OF ACTION

(Request for Relief under Article 78 of the CPLR)

92. Petitioner incorporates by reference the allegations set forth in paragraphs 1 to 91 of this Petition as if fully set forth herein.

93. The Sodium Mandate is substantively invalid because it is riddled with arbitrary exclusions and exemptions that are unrelated to the stated purpose of the rule. Respondents should be enjoined from enforcing such an arbitrary and capricious rule. CPLR §§ 7803, 7806.

94. An administrative regulation will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious. Agency rules are scrutinized for reasonableness and rationality in the specific context.

95. The arbitrary or capricious standard chiefly "'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" *Pell v. Bd. of Educ.,* 34 N.Y.2d 222, 231 (1974).

96. Agency rules will be invalidated unless they bear some rational relationship to the goals sought to be achieved, and are factually based.

97. In making this assessment, the court is limited to considering the reasons the Board gave in taking action at the time it took action. If those grounds are inadequate or

improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

A. Application Of The Sodium Mandate To Some Food Vendors But Not Others Is Arbitrary And Capricious

98. It is wholly irrational to require only a select and relatively minimal segment of FSEs and food vendors in New York City to post the Icon and Risk Statement while permitting thousands of others to sell the exact same menu items (or other items containing the same amount of sodium or more) without the Icon or Risk Statement.

99. The Sodium Mandate applies only to chain FSEs with 15 or more locations nationally, excluding all independent restaurants, chain restaurants with fewer than 15 locations nationally, most delicatessens, grocery stores, convenience stores, and bodegas. As such, it does not apply to the vast majority of businesses that sell foods with the same amount of sodium (or more) than the Covered Establishments.

100. Two-thirds of dietary sodium comes from grocery items, not from restaurants at all. Only 18.9% to 31.8% of dietary sodium comes from restaurant food, and the Sodium Mandate reaches only a small subset of those restaurants. Fewer than 20% of New York City's approximately 24,000 restaurants are Covered Establishments.

101. Covered Establishments selling food items containing 2,300 milligrams or more of sodium, such as Spicy Oriental Chicken Salad, are required to post the Icon and Risk Statement, but the non-chain restaurant next door, or the delicatessen down the block selling prepared foods by the pound, could sell the same Spicy Orange Chicken Salad without displaying the Icon or Risk Statement. Likewise, New York City grocery stores that sell prepackaged Spicy Orange Chicken Salad need not warn their customers with the Icon or the Risk Statement either.

102. Such a scheme will make no sense to consumers, because it does not make any sense. They will be misled into understanding from the appearance of the Icon and Risk Statement in Covered Establishments, but not in others, that the Covered Establishments' products contain more than 2,300 mg of sodium, but that the menu items of the other establishments do not. This is not true.

103. It is completely irrational to require one food establishment to post the "warning" on its menu items, when other restaurants and food vendors selling the same meals on the same block (or meals with even higher sodium levels) have no such obligation.

104. This illogical line drawing has serious implications because New York City has a tremendous number of independent and small chain restaurants. As one example of the absurd results of this line drawing, the DOH website reveals that there are nearly 4,000 Asian restaurants in New York City, and Asian fare frequently contains soy sauce, monosodium glutamate and other high sodium ingredients, resulting in menu items that contain more than 2,300 mg of sodium. Yet, few of these restaurants will be subject to the Sodium Mandate or be required to post the Icon and Risk Statement to warn consumers about the sodium content of their food and alleged health risks associated therewith because they are not Covered Establishments. Yet, Covered Establishments whose meals have no greater sodium content will have to post the Icon and Risk Statement on their menus.

105. The determination of Covered Establishments versus non-covered establishments bears no rational relationship to the asserted goal of helping consumers identify food items containing 2,300 milligrams or more of sodium and "warning" them that consumption of such items may be dangerous to them and their families.

106. The stated objective of the Sodium Mandate – reducing sodium intake by warning consumers about high-sodium foods and helping them make healthier choices – and the arbitrary focus on chain fast food restaurants, which provide less than 10% of dietary sodium to city residents, also renders the Sodium Mandate indefensible.

107. The consequence of applying the Sodium Mandate to only some FSEs arbitrarily punishes or benefits essentially identical competitors. A small chain restaurant, an independent restaurant, or a delicatessen with rows of prepared foods sold by the pound may continue to sell food items regardless of their sodium content without having to post any Icon or Risk Statement whatsoever connected to the offerings. By contrast, a Covered Establishment must put Icons and Risk Statements next to precisely the same items on its menu (or items with even less sodium content than its neighbor sells), putting them at a competitive disadvantage. The Risk Statement expressly and impliedly states that the food item is unhealthy or may put the consumer at risk, and thus may drive customers not only away from that one item, but away from the restaurant and into the arms of a neighboring establishment that seemingly sells "healthy" or "safe" foods without such warnings.

B. The Sodium Mandate, As Applied To Menu Items, Is Arbitrary And Capricious

108. The Sodium Mandate provides that the Icon must appear next to any menu item, or combination meal offered, that contain 2,300 milligrams or more of sodium per discrete serving unit. In addition, if any option on a menu item results in a combination meal with 2,300 mg of sodium or more, or if any possible version of a menu item contains 2,300 mg of sodium or more, the Icon must be used next to the item. These definitions and requirements result in a confusing use of the Icon and render the Sodium Mandate more misleading to consumers than helpful.

109. The fact that the regulation focuses on the sodium content of "menu items" rather than of entire meals – and thus treats á la carte items and combination meals the same under the statute – creates the illogical result that foods when served as a combination meal are flagged as containing allegedly risky levels of sodium, but the exact same foods sold á la carte do not. Thus, a combination meal containing a Super Burger with Cheese and French Fries must bear the Icon if the combination item has more than 2,300 milligrams of sodium. However, for the exact same Super Burger with Cheese and French Fries sold separately, no Icon need be posted, because neither item alone contains 2,300 milligrams of sodium. The consumer purchasing the items á la carte thus receives no notification that the food selected allegedly contains risky levels of sodium, but the purchaser of the combination item does.

110. If the Icons drive consumer selections of foods as intended, they will lead to results that directly contradict the stated purpose of the Sodium Mandate, because even in the same restaurant, the Risk Statement will steer consumers away from one food item and to other food items that have equally high, or even higher, sodium levels. For example, a menu item Spicy Orange Chicken Salad must be flagged with an Icon to warn consumers that it has more than 2,300 mg of sodium, but the Super Burger with Cheese and French Fries do not, because they are sold separately, and neither alone exceeds the trigger level. The overall message to the consumer is that a Super Burger with Cheese and fries has a lower, and safer, level of sodium than the Spicy Orange Chicken Salad, but that message is simply not true: the two meals have comparable levels of sodium. In addition, the overall nutritional health of one item versus the other is left unaddressed, and the items without the Icons may be less healthy overall for consumers than the flagged items.

111. Once varieties of menu items, and sides for menu items, are taken into account, any rationality of the Sodium Mandate breaks down: it results in flagging menu items as having more than 2,300 mg of sodium when they do not. If six burrito toppings are available on a menu and only one of the toppings (e.g., cheese) would cause the burrito to exceed the 2,300 mg level, the Icon must appear on the menu next to the burrito. The appearance of the Icon informs consumers that the burrito has more than 2,300 mg of sodium – and may cause high blood pressure and increased risk of cardiac illness – when in fact most burritos created from the optional toppings likely do *not* contain that level of sodium.

112. The vast number of options available in many Covered Establishments exponentially increases the misleading information provided by the Sodium Mandate to consumers. Mix and match sides, options and toppings for food items (such as pizza toppings or burrito ingredient options) are extremely common, and can result in dozens, or even thousands, of different final products. Each combination contains different sodium levels, but they are all flagged as containing more than 2,300 mg of sodium when they do not. Thus, far from helping consumers to be "readily able to identify menu items containing . . . 2,300 mg or more of sodium," the Icon will appear on menu items that do *not* have such levels of sodium, and for which the Risk Statement is unquestionably improper.

113. There is no credible health-based or scientific rationale for posting the Icon on "menu items" (regardless of whether they are combination meals or á la carte items), and for requiring the Icon to appear on a menu item if "any" variation of the item causes it to cross the 2,300 mg threshold. This results in a regulation that is completely illogical and arbitrary.

114. With the Sodium Mandate, there is no rational relationship between what items bear the Icon and Risk Statement and the objective of identifying high sodium foods for

consumers to assist in reducing the amount of cardiovascular illness, and as a result is arbitrary and capricious.

FOURTH CAUSE OF ACTION

(Violation of the First Amendment of the United States Constitution)

115. Petitioner incorporates by reference the allegations set forth in paragraphs 1 to 114 of this Petition as if fully set forth herein.

116. The Free Speech Clause of the First Amendment of the Unites States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

117. The Fourteenth Amendment of the United States Constitution made this proscription applicable to the States and their political subdivisions. *See* U.S. Const. amend. XIV § 1.

118. In protecting the autonomy of every speaker to choose the content of his or her message, the First Amendment guarantees the right to speak freely, as well as the right not to speak, and the right to choose the content of one's own speech. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1985).

119. Laws compelling speech generally receive strict scrutiny. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977). Strict scrutiny requires the government to show that the regulation at issue is "justified by a compelling government interest" and is "narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011); *United States v. Playboy Entm't, Inc.*, 529 U.S. 803, 811 (2000). A statute is not narrowly tailored if "a less restrictive alternative would serve the Government's purpose." *See Playboy*, 529 U.S. at 813.

120. First Amendment protections extend to commercial speech as well as to other forms of expression. *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980) ("*Central Hudson*").

121. Even commercial speech, however, is subject to strict scrutiny where a regulation compels a party to state government opinions or viewpoints. *See PG&E*, 475 U.S. at 910; *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 651-52 (7th Cir. 2006); *see also Riley v. Nat'l Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988) ("we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech").

122. The Sodium Mandate falls under this category, and violates the Free Speech Clause because it forces the owners and operators of Covered Establishments to parrot Respondents' *opinion* on the health effects of ingesting certain levels of sodium—an opinion not shared by many owners and operators of the Covered Establishments. As discussed above, there is substantial scientific controversy as to whether consuming 2,300 milligrams or more of sodium daily puts individuals at heightened cardiovascular risk. The Sodium Mandate forces Covered Establishments to use their private property to advance and disseminate Respondents' side of the debate over sodium intake.

123. The Sodium Mandate is not narrowly tailored to further a compelling government interest, as it must be. *See* Brown *v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011); *United States v. Playboy Entm't, Inc.*, 529 U.S. 803, 811 (2000).

124. Even if the statements required by the Sodium Mandate are not considered to be opinion, and are deemed purely commercial, they must still pass intermediate scrutiny. They cannot.

125. The Sodium Mandate does not directly and materially advance Respondents' purported interests as expressed in the Notice of Adoption. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995) (internal citations and quotation marks omitted). "[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564. To establish that the Sodium Mandate directly and materially advances the Board's asserted interests, Respondents would have to show both that ingesting 2,300 milligrams or more of sodium daily is in fact harmful to consumers, and that its warning would have the effect of reducing consumers' ingestion of more than 2,300 milligrams of sodium daily. The numerous exemptions to the Sodium Mandate undercut the Board's asserted purpose by exempting the majority of the sources of the supposed harm. Given the inconsistent application of the Sodium Mandate to food establishments in New York City, and the confusion it is likely to cause consumers, Respondents cannot demonstrate that the Sodium Mandate directly and materially advances the goal of reducing cardiovascular disease.

126. The Sodium Mandate is also more extensive than necessary to achieve the Respondents' stated aims, and thus imposes undue burdens on the Covered Members' speech. *See Central Hudson*, 447 U.S. at 570-71. The Sodium Mandate is not "narrowly tailored" to promote New Yorkers' health. To the contrary, because the Sodium Mandate requires a blanket "Warning" to all consumers in a Covered Establishment, the Risk Statement will invariably be broadcast not only to consumers whose health is unaffected by what the Sodium Mandate refers to as "high sodium intake," but also to those whose health requires "high sodium intake" or who could suffer adverse health consequences from heeding the Risk Statement. The Sodium Mandate also cannot pass muster under this branch of the standard because there are plainly less restrictive alternatives to serve the Board's asserted interest.

127. Since the Sodium Mandate cannot withstand intermediate scrutiny under *Central Hudson*, it cannot withstand the even more restrictive standard of strict scrutiny.

128. The Sodium Mandate does not cure or mitigate consumer deception. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651-53 (1985); *Milavetz, Gallop & Milavetz P.A. v. United States*, 559 U.S. 229, 250 (2010).

129. The Sodium Mandate compels the Covered Members to disseminate messages and information that are not purely factual and uncontroversial, but are instead inaccurate, misleading, controversial and unduly burdensome. *See Zauderer*, 471 U.S. at 651.

130. The Sodium Mandate could not survive review even under the *Zauderer* standard because the mandated disclosures are unduly burdensome.

131. Petitioner has no adequate remedy of law for such deprivation of its Covered Members' rights.

132. The Sodium Mandate violates the Covered Members' First Amendment rights, and the Court should issue a declaratory judgment finding the Sodium Mandate unconstitutional.

FIFTH CAUSE OF ACTION

(Preemption)

133. Petitioner incorporates by reference the allegations set forth in paragraphs 1 to 132 of this Petition as if fully set forth herein.

134. The Supremacy Clause (Article VI) of the United States Constitution states that the "Laws of the United States which shall be made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land. . . ." Where there is a conflict between a state law and federal law, the federal law preempts the state law.

135. The NLEA expressly preempts state or local requirements for food labeling that are "not identical" to certain requirements of the NLEA or the Federal Food, Drug, and Cosmetic Act ("FFDCA"). 21 U.S.C. § 343-1.

136. At issue is Section 343(r) of the NLEA, entitled "Nutrition levels and health-related claims," and the related preemption provision, Section 343-1(a)(5). The NLEA expressly preempts state or local requirements "respecting any claim of the type described in section 343(r)(1) of this title made in the label or labeling of food that is not identical to the requirement of section 343(r)." 21 U.S.C. § 343-1(a)(5). The claims described in section 343(r)(1), which are expressly preempted, include "health claims" and "nutrient content claims." 21 U.S.C. § 343(r)(1)(A) and (B).

137. "Health Claims" are defined as any claim that "characterizes the relationship of any nutrient which is of the type required by paragraph (q)(1) or (q)(2) to be in the label or labeling of the food to a disease or health-related condition." 21 U.S.C. § 343(r)(1)(B).

138. "Nutrient content claims" are defined as any claim that "characterizes the level of any nutrient which is of the type required by paragraph (q)(1) or (q)(2) to be in the label or labeling of the food." 21 U.S.C. § 343(r)(1)(A). Paragraph (q)(1) and (q)(2) refer to nutrition labeling, and sodium is a nutrient required in nutrition labeling. 21 C.F.R. § 101.9(c)(4).

139. The relevant FDA regulations also make it clear that the preemptive effect of section 343-1(a)(5) extends to health claims and nutrient content claims regarding food nutrients. These regulations define "health claims" broadly as "any claim made on the label or in the labeling of a food . . . that expressly or by implication, characterizes the relationship of any substance to a disease or health-related condition." 21 C.F.R. § 101.14(a)(1). For purposes of

the regulations, sodium qualifies as a "substance" because it is a component of a food. *Id.* at 101.14(a)(2).

140. Examples of "health claims" within the meaning of the NLEA and FDA regulations include "fiber helps to prevent cancer," *Pub. Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 15 (D.D.C. 1996); "frequent between-meal consumption of foods high in sugars and starches promotes tooth decay," (21 C.F.R. 101.80); and "[d]iets rich in whole grain foods and other plant foods and low in total fat, saturated fat, and cholesterol may reduce the risk of heart disease and some cancers," (*see* FDA Modernization Act Health Claim, Docket No. 1999P-2209).

141. A "nutrient content claim" is any "claim on a food product that directly or by implication characterizes the level of a nutrient in the food (*e.g.,* "low fat," "high in oat bran," or "contains 100 calories"). 21 C.F.R. 101.13(b); 21 C.F.R. 101.13(a).

142. The Sodium Mandate impermissibly requires an unauthorized health claim linking the substance sodium with the health-related conditions high blood pressure, heart disease, and stroke, in violation of the NLEA.

143. The Icon is part of this health claim, because symbols are included within the definition of health claim, and the salt shaker symbol links the food to the statement about blood pressure, heart disease, and stroke. By way of comparison, FDA treats a heart symbol as a health claim, regardless of whether it is linked to a statement about the risk of a disease. 21 C.F.R. § 101.14(a)(1).

144. A health claim can only be made on the label or labeling of food if it is (1) specifically authorized by FDA regulations as set forth in 21 U.S.C. § 343(r)(3)(A) & (B); or (2) permitted under the Food and Drug Administration Modernization Act ("FDAMA") notification process set forth in Section 343(r)(3)(C).

145. The FDA has not authorized any health claims regarding high sodium intake and blood pressure, heart disease, or stroke. It has authorized claims regarding low sodium intake and the risk of hypertension or high blood pressure, *see* 21 C.F.R. § 101.74, but the Risk Statement — linking *high* sodium intake with the health-related conditions high blood pressure, heart disease, and stroke—is not "identical to" this authorized health claim, and the statutory and regulatory framework requires that the exact claim language be pre-authorized by the FDA.

146. The Sodium Mandate requires restaurants to make an unauthorized nutrient content claim because the Icon and first sentence of the Risk Statement categorize the level of sodium (*i.e.*, at or above 2,300 mg) as "high sodium intake." Such statements made in the label or labeling of food that categorizes the level of a nutrient in a food may only be made if specifically authorized by the FDA. 21 U.S.C. § 343(r)(1)(A). While the FDA has authorized nutrient content claims concerning the level of sodium in foods, *see* 21 C.F.R. § 101.61, the FDA has not authorized the nutrient content claim made in the Icon and Risk Statement.

147. Because the Sodium Mandate requires a health claim and a nutrient content claim on food labeling that has not been authorized by the FDA and differs from the requirements of the NLEA and FFDCA, the Sodium Mandate is preempted under the Supremacy Clause of the United States Constitution and thus invalid.

PRIOR APPLICATION

148. No prior application has been made for the relief requested herein.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Petitioner requests that this Court enter an Order:

(a) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing § 81.49 of the New York City

Health Code, as purportedly amended by DOH in September 2015, on the basis that DOH had no authority to do so, declaring § 81.49 invalid;

(b) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing § 81.49 of the New York City Health Code, as purportedly amended by DOH in September 2015, on the basis that it was promulgated in violation of the separation of powers, and declaring that Sections 558, 556 and 1043(b) of the N.Y.C. Charter are unconstitutional because they violate the separation-of-powers doctrine to the extent they are found to have delegated and/or authorized Defendants-Respondents to promulgate § 81.49 of the New York City Health Code;

(c) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing § 81.49 of the New York City Health Code, as purportedly amended by DOH in September 2015, on the basis that it is unlawfully arbitrary and capricious, and declaring § 81.49 invalid;

(d) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing § 81.49 of the New York City Health Code, as purportedly amended by DOH in September 2015, on the basis that it violates the First Amendment of the Unites States Constitution, and declaring that § 81.49 is invalid on that basis;

(e) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing § 81.49 of the New York City Health Code, as purportedly amended by DOH in September 2015, on the basis that, being inconsistent with federal labeling laws, is preempted under the Supremacy Clause of the United States Constitution and, therefore, of no force, and declaring that § 81.49, being inconsistent with

federal labeling laws, is preempted under the Supremacy Clause of the United States Constitution and, therefore, of no force;

(f) Awarding Plaintiff-Petitioner costs and disbursements against Defendants-Respondents pursuant to CPLR § 8101; and

(g) Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
December 3, 2015

Respectfully submitted,

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VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Pursuant to CPLR § 3020, S. PRESTON RICARDO, being duly sworn, deposes and says:

I am counsel for Plaintiff-Petitioner in the above-entitled action with offices located at 437 Madison Avenue, City of New York, County of New York, State of New York. I have read the foregoing Verified Article 78 & Declaratory Judgment Petition and know the contents thereof; the same is true to my own knowledge, except as to the matters stated to be alleged upon information and belief, and that as to those matters I believe them to be true.

The reason why this verification is made by me instead of Plaintiff-Petitioner is because the Plaintiff-Petitioner is not located within the County of New York, where my offices are located. I further state that the grounds of my belief as to all matters in the Verified Article 78 & Declaratory Judgment Petition not stated to be upon my knowledge are based upon correspondence and other writings furnished to me by Plaintiff-Petitioner.

S. Preston Ricardo

Dated: December 3, 2015