

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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LONG ISLAND GASOLINE RETAILERS
ASSOCIATION, INC., NEW YORK STATE
ASSOCIATION OF SERVICE STATIONS AND
REPAIR SHOPS, INC., NEW YORK
ASSOCIATION OF CONVENIENCE STORES,
SERVICE STATION DEALERS OF GREATER
NEW YORK, INC. and UNITED 7-ELEVEN
FRANCHISE OWNERS OF LONG ISLAND AND
NEW YORK,

Index No.:

Date Filed:

VERIFIED COMPLAINT

Plaintiffs,

-against-

DAVID A. PATERSON, in his official capacity as
Governor of the State of New York, ANDREW M.
CUOMO, in his official capacity as Attorney
General of the State of New York and JAMIE
WOODWARD, in her official capacity as Acting
Commissioner of the New York State Department
of Taxation and Finance,

Defendants.

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Plaintiffs, Long Island Gasoline Retailers Association, Inc., New York State Association
of Service Stations and Repair Shops, Inc., New York Association of Convenience Stores,
Service Station Dealers of Greater New York, Inc., United 7-Eleven Franchise Owners of Long
Island and New York, (hereinafter referred to collectively as "Plaintiffs") by and through their
attorneys, FORCHELLI, CURTO, DEEGAN, SCHWARTZ, MINEO, COHN & TERRANA, LLP, for their
complaint against Defendants, David A. Paterson, in his official capacity as Governor of the
State of New York, Andrew M. Cuomo, in his official capacity as Attorney General of the State
of New York; and Jamie Woodward, in her official capacity as Acting Commissioner of the New

York State Department of Taxation and Finance, (hereinafter referred to collectively as “Defendants”) respectfully, allege as follows:

PARTIES

1. Plaintiff, Long Island Gasoline Retailers Association, Inc., is a not-for-profit association of gasoline retailers on Long Island, with its principal place of business located at 270 Spagnoli Road, Melville, New York 11747.

2. Plaintiff, New York State Association of Service Stations and Repair Shops, Inc., is a not for profit association of service stations and repair shops with its principal place of business located at 6 Walker Way, Albany, New York 12205.

3. Plaintiff, New York Association of Convenience Stores is a not for profit association of convenience store owners on Long Island with its principal place of business located at 130 Washington Avenue, Suite 300, Albany, New York 12210.

4. Service Station Dealers of Greater New York, Inc. is a not for profit association of automobile service stations with its principal place of business located at 421 Waverly Avenue, Mamaroneck, New York 10543.

5. United 7-Eleven Franchise Owners of Long Island and New York is a not for profit association of 7-11 store owners - with its principal place of business located at 265 Sunrise Highway, Rockville Centre, New York 11570.

6. Upon information and belief, Defendant David A. Paterson, sued in his official capacity, is the Governor of the State of New York and has authority over the executive agencies of the State of New York.

7. Upon information and belief, Defendant Andrew M. Cuomo, sued in his official capacity, is the Attorney General of the State of New York and has authority to enforce the laws of the State of New York including the provisions of the New York State Department of Taxation and Finance.

8. Upon information and belief, Defendant Jamie Woodward, sued in her official capacity, is the Acting Commissioner of the New York State Department of Taxation and Finance, an executive agency of the State of New York with authority to implement and enforce certain provisions of the New York State Tax Law.

NATURE OF CLAIM

9. This action is brought for declaratory relief under CPLR §3001 pursuant to the Fourteenth Amendment to the United States Constitution, and Article 1, §§6 and 11 of the New York State Constitution.

10. Plaintiffs have standing to bring these claims because their members would otherwise have standing to sue in their own right, the interests the Plaintiffs seek to protect are germane to the Plaintiffs' purpose, and neither the claims asserted nor the relief requested requires the participation of individual members of the Plaintiff associations in the lawsuit.

INTRODUCTION

11. Plaintiffs bring this action to enjoin the implementation of certain recent amendments to the N.Y. Tax Law §480-a(2)(a)(ii), as amended by L.2009, Chapter 58, pt. C, §125 (effective April 7, 2009, deemed effective April 1, 2009) (known as "N.Y. Tax Law § 480-a").

12. These amendments, *inter alia*, dramatically increase the registration fee for the permitted sale of tobacco products in the State of New York.

13. By these amendments, the New York State Legislature has approved a 900% to 4900% increase from the current \$100.00 per store/per year registration fee for tobacco retailers.

14. The amendments modify the registration fee so that it is based upon the annual gross sales of all products sold at a business location. The new minimum fee is \$1,000.00 if annual gross sales are less than \$1 million; \$2,500.00 if annual gross sales are between \$1 million and less than \$10 million; and \$5,000.00 if annual gross sales equal or exceed \$10 million.

15. As indicated, the amount of the registration fee is not calculated based on the amount of tobacco products sold.

16. The registration fees collected are not solely used for the enforcement and costs of monitoring the registrant tobacco retailers, but instead are made part of the general funds of the State.

17. Upon information and belief, given that the monies collected for the registration fee go into a general fund for many other unrelated purposes, the fee is, in fact, not a “registration fee” but is in actuality a *de facto* tax upon retailers of tobacco products.

18. According to the legislative history of N.Y. Tax Law §480-a, the monies generated by the increased registration fee will not be used to finance the costs of administering tobacco sales in New York State, but instead are being assessed as part of *The Health Care Improvement Act* to give citizens of New York State, *inter alia*, a high-performing health care

system.

19. The registration fee is irrationally calculated upon the “gross sales” of each particular business enterprise and, as such, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as it imposes unreasonable and arbitrary classifications unrelated to the object of the registration, unfairly penalizing certain retailers.

20. The registration fee is irrationally calculated and determined based upon the “gross sales” of each particular business enterprise and, as such, violates Article 1, §11 (Equal Protection) of the New York State Constitution, as it imposes unreasonable and arbitrary classifications unrelated to the object of the registration, unfairly penalizing certain retailers.

21. The registration fee is irrationally calculated and determined based upon the “gross sales” of each particular business enterprise and, as such, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, as it arbitrarily damages and wrongfully impairs Plaintiffs’ members’ businesses without serving any plausible public objective.

22. The registration fee is irrationally calculated and determined based upon the “gross sales” of each particular business enterprise and, as such, violates Article 1, §6 (Due Process) of the New York State Constitution, as it arbitrarily damages and wrongfully impairs Plaintiffs’ members’ businesses without serving any permissible public objective.

23. New York has no plausible rational basis for calculating a registration fee for the sale of tobacco products based upon the gross sales of completely unrelated products, such as gasoline and diesel fuel, as is the case of many of the represented Plaintiffs herein.

24. New York has no plausible rational basis for calculating a registration fee for the sale of tobacco products based upon the gross sales of completely unrelated products, such as food and other sundry items, as is the case of many of the represented Plaintiffs herein.

25. Moreover, the act of assessing the registration fee on gross sales of food – on which a tax in most cases may not be imposed as a matter of law – is wholly improper.

26. There is absolutely no justification in taxing all businesses which sell tobacco on “gross sales” of other products while there is no such similar penalty to entities that solely sell tobacco products.

GENERAL ALLEGATIONS

27. N.Y. Tax Law required a mere \$100.00 fee charged to all retailers of tobacco products. Prior to the recent amendment N.Y. Tax Law §480-a(2)(a)(ii) read as follows:

“(ii) Every retail dealer and every person owning or, if the owner is not the operator, then any person operating one or more vending machines through which cigarettes or tobacco products are sold in this state, who is required under section eleven hundred thirty-six of this chapter to file a return for the quarterly period ending on the last day of August, nineteen hundred ninety or for the quarterly period ending on the last day of August in any year thereafter, shall file an application for registration under this section with such quarterly return, in such form as shall be prescribed by the commissioner of taxation and finance. Each retail dealer shall pay an application fee with such quarterly return of one hundred dollars for each retail place of business in this state through which it sells cigarettes or tobacco products. Every person who owns or, if the owner is not the operator, then any person who operates one or more vending machines through which cigarettes or tobacco products are sold in this state, regardless of whether located on the premises of the vending machine owner or, if the owner is not the operator, then the premises of the operator or the premises of any other person, shall pay an application fee with such quarterly return of twenty-five dollars for each such vending machine. The department shall issue a registration certificate, as prescribed by the commissioner of taxation and finance, after receipt

of a registration application and the appropriate registration fee, prior to the next succeeding January first.” (Emphasis added)

28. After the recent amendment, N.Y. Tax Law §480-a(2)(a)(ii) provides as follows:

(ii) Each retail dealer must pay an application fee with the quarterly return described by subparagraph (i) of this paragraph for each retail place of business in this state through which it sells cigarettes or tobacco products, which is based on gross sales of that place of business during the previous calendar year. The application fee is: one thousand dollars for each retail place of business with gross sales totaling less than one million dollars; two thousand five hundred dollars for each retail place of business with gross sales totaling at least one million dollars but less than ten million dollars; and five thousand dollars for each retail place of business with gross sales totaling at least ten million dollars.

29. The foregoing amendment to the fee schedule under N.Y. Tax Law §480-a(2)(ii) (hereinafter referred to as the “Amended Fee Schedule”) constitutes an irrational basis upon which the registration fee for the sale of tobacco products is determined.

30. The Amended Fee Schedule now punishes retailers that sell more than just tobacco products alone, by including such unrelated sales in the calculation by which the fee is determined.

31. The Amended Fee Schedule further, in its practical application, imposes a tax on food since food products maybe included in the calculation of gross sales for determination of the registration fee paid.

32. The Amended Fee Schedule further punishes retailers, such as many of the small business owners represented by the Plaintiffs herein, by imposing substantial registration fees for the sale of an unrelated products where the gross receipts are high, but the profit margin is low.

33. The profit margin on gasoline and diesel fuel is *de minimus* and the sale of same disproportionately inflates gross sales, relative to the degree of profit generated by these products.

34. The inclusion of the sale of fuel products, for example, in the determination of the registration fee is irrational on its face.

35. Defendants have acted under the color of state law in causing and threatening to cause the deprivation of Plaintiffs' constitutional rights under the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution.

36. The Defendants have further acted under the color of state law in causing and threatening to cause the deprivation of Plaintiffs' constitutional rights under the Equal Protection and Due Process clauses of Article I, §§6 and 11 of the New York State Constitution.

COUNT I

(VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION)

37. Plaintiffs restate and incorporate by reference the allegations of paragraphs 1 to 36 of this Complaint, as if fully set forth herein.

38. Under the Amended Fee Schedule, the Plaintiffs and member companies and those similarly situated that sell more than just tobacco products are treated differently from similarly-situated companies that simply sell tobacco alone.

39. As such, the Amended Fee Schedule does not have a rational basis for its application.

40. Accordingly, the Amended Fee Schedule violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

41. Plaintiffs are therefore entitled to a declaratory judgment that the Amended Fee

Schedule is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

42. Plaintiffs will suffer immediate and irreparable harm if Defendants are permitted to implement and enforce the Amended Fee Schedule.

43. Plaintiffs are further entitled to a preliminary and permanent injunction enjoining Defendants from implementing or enforcing the Amended Fee Schedule.

COUNT II

(VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE NEW YORK STATE CONSTITUTION)

44. Plaintiffs restate and incorporate by reference the allegations of paragraphs 1 to 43 of this Complaint, as if fully set forth herein.

45. Under the Amended Fee Schedule, the Plaintiffs and member companies and those similarly situated that sell more than just tobacco products are treated differently from similarly-situated companies that simply sell tobacco alone.

46. As such, the Amended Fee Schedule does not have a rational basis for its application.

47. Accordingly, the Amended Fee Schedule violates Article 1, §11 (Equal Protection) of the New York State Constitution.

48. Plaintiffs are therefore entitled to a declaratory judgment that the Amended Fee Schedule is unconstitutional under Article 1, §11 (Equal Protection) of the New York State Constitution.

49. Plaintiffs will suffer immediate and irreparable harm if Defendants are permitted to implement and enforce the Amended Fee Schedule.

50. Plaintiffs are further entitled to a preliminary and permanent Injunction enjoining

Defendants from implementing or enforcing the Amended Fee Schedule.

COUNT III

(VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION)

51. Plaintiffs restate and incorporate by reference the allegations of paragraphs 1 to 50 of this Complaint, as if fully set forth herein.

52. The newly enacted legislation will substantially harm, if not destroy, the businesses of many of the Plaintiffs represented in this action in that the additional costs associated with the registration fee, are, in some cases, a 4900% increase in said fee.

53. As a result of this drastic increase, many of the members of the Plaintiff associations will be forced to discontinue the sale of cigarettes and will suffer an immediate damage to their business from the loss of this revenue.

54. They will further lose the additional revenue generated by the sale of other products typically made at the time of the sale of a tobacco product to a customer, such as newspapers, coffee, etc.

55. It is contemplated that the Amended Fee Schedule will result in lost revenues that are so significant that many of these businesses will not survive.

56. Accordingly, the Amended Fee Schedule results in the deprivation of property of the Plaintiffs without due process of law in contravention of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

57. Plaintiffs are therefore entitled to a declaratory judgment that the Amended Fee Schedule is unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

58. Plaintiffs will suffer immediate and irreparable harm if Defendants are permitted

to implement and enforce the Amended Fee Schedule.

59. Plaintiffs are further entitled to a preliminary and permanent injunction enjoining Defendants from implementing or enforcing the Amended Fee Schedule.

COUNT IV
(VIOLATION OF THE DUE PROCESS CLAUSE NEW YORK STATE CONSTITUTION)

60. Plaintiffs restate and incorporate by reference the allegations of paragraphs 1 to 59 of this Complaint, as if fully set forth herein.

61. The newly enacted legislation will substantially harm, if not destroy, the businesses of many of the Plaintiffs represented in this action in that the additional costs associated with the registration fee, are, in some cases, a 4900% increase in said fee.

62. As a result of this drastic increase, many of the members of the Plaintiff associations will be forced to discontinue the sale of cigarettes and will suffer an immediate damage to their business from the loss of this revenue.

63. They will further lose the additional revenue generated by the sale of other products typically made at the time of the sale of a tobacco product to a customer, such as newspapers, coffee, etc.

64. It is contemplated that the Amended Fee Schedule will result in lost revenues that are so significant that many of these businesses will not survive.

65. Accordingly, the Amended Fee Schedule results in the deprivation of property of the Plaintiffs without due process of law in contravention of Article 1, §6 (Due Process) of the New York State Constitution.

66. Plaintiffs are therefore entitled to a declaratory judgment that the Amended Fee Schedule is unconstitutional under Article 1, §6 (Due Process) of the New York State

Constitution.

67. Plaintiffs will suffer immediate and irreparable harm if Defendants are permitted to implement and enforce the Amended Fee Schedule.

68. Plaintiffs are further entitled to a preliminary and permanent injunction enjoining Defendants from implementing or enforcing the Amended Fee Schedule.

WHEREFORE, Plaintiffs respectfully request a judgment as follows:

(1) Declaring and adjudging that the payments mandated under N.Y. Tax Law §480-a(2)(ii), as amended, are invalid as fees under New York law as they do not bear a reasonable relationship to the cost of administering the program said fees purport to regulate; and

(2) Declaring and adjudging that the Amended Fee Schedule is unconstitutional under the Equal Protection Clause of Fourteenth Amendment of the United States Constitution; and

(3) Declaring and adjudging that the Amended Fee Schedule is unconstitutional under the Equal Protection Clause of the New York State Constitution, Article 1, §11; and

(4) Declaring and adjudging that the Amended Fee Schedule is unconstitutional under the Due Process Clause under the United States Constitution; and

(5) Declaring and adjudging that the Amended Fee Schedule is unconstitutional under the Due Process Clause under the New York State Constitution, Article 1, §6; and

(6) Preliminarily and permanently enjoining Defendants from implementing or enforcing the Amended Fee Schedule; and

(7) Awarding Plaintiffs their reasonable attorneys' fees; and

(8) Taxing Defendants the costs of this litigation; and

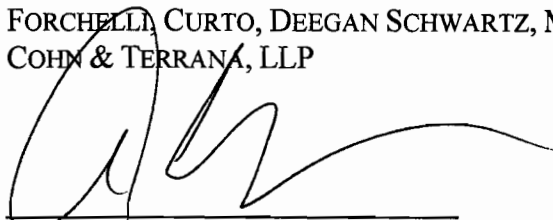
(9) Granting Plaintiffs such other and further relief as the Court may deem just and

proper.

Dated: Uniondale, New York
September 11, 2009

Respectfully submitted,

FORCHELLA CURTO, DEEGAN SCHWARTZ, MINEO,
COHN & TERRANA, LLP



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