UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMER ELECTRONICS ASSOCIATION, INFORMATION TECHNOLOGY INDUSTRY COUNCIL, and ITAC SYSTEMS, INC., Plaintiffs, v. CITY OF NEW YORK, MICHAEL R. BLOOMBERG, in his official capacity as Mayor of the City of New York, NEW YORK CITY DEPARTMENT OF SANITATION, JOHN J. DOHERTY, in his official capacity as the Commissioner of the Department of Sanitation, and ROBERT LANGE, in his official capacity as Director of Waste Prevention, Reuse and Recycling of the Department of Sanitation, Defendants.	09 Civ. 6583 (WHP) ECF Case

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

BEVERIDGE & DIAMOND, P.C.

Michael G. Murphy (MM 5436)
Megan R. Brillault (MB 5562)
477 Madison Avenue,15th Fl.
New York, NY 10022

James B. Slaughter (admitted *pro hac vice)*
Nadira Clarke (admitted *pro hac vice)*
1350 I Street, N.W., Suite 700
Washington, D.C. 20005

Attorneys for Plaintiffs
Consumer Electronics Association,
Information Technology Industry
Council, and ITAC Systems, Inc.

TABLE OF CONTENTS

Page

TABLE OF DECLARATIONS IN SUPPORT OF PLAINTIFFS' MOTION ii

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 2

FACTS 6

A. Defendant Mayor Bloomberg Vetoes a Portion of the Original Law 6

B. E-waste Law Requirements 6

C. The E-waste Rules 8

STANDARD FOR PRELIMINARY INJUNCTION 11

ARGUMENT 11

I. THE E-WASTE PROGRAM WILL IRREPARABLY HARM PLAINTIFFS AND OTHER MANUFACTURERS 11

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS 13

A. The E-waste Program Violates The Dormant Commerce Clause 14

1. The E-waste Program Improperly Controls Commerce In Other States. . 15

2. The E-waste Program Improperly Burdens Interstate Commerce 16

3. The E-waste Program Discriminates Against Interstate Commerce 18

B. The E-waste Program Violates the Equal Protection and the Due Process Clauses 18

1. The Program Violates the Equal Protection Clause 18

2. The Program Violates Plaintiffs' Rights to Due Process 19

C. The E-Waste Program Imposes Retroactive Liability Violating the Contract, Takings and Due Process Clauses of the United States Constitution 20

D. DSNY's Failure to Assess Potential Environmental Impacts Prior to Finalizing the E-waste Rules Violates SEQRA and CEQR 22

E. The E-Waste Rules and Program are Arbitrary and Capricious and an Abuse of the City's Police Powers 24

CONCLUSION 25

APPENDIX

TABLE OF DECLARATIONS IN SUPPORT OF PLAINTIFFS' MOTION

1. Declaration of John Ernsberger of ITAC Systems, Inc., dated August 3, 2009 ("ITAC Decl.")
2. Declaration of Timothy McGrady of LG Electronics USA, Inc., dated July 24, 2009 ("LG Decl.")
3. Declaration of Jeffrey Whitelaw of Mitsubishi Digital Electronics America, Inc., dated August 5, 2009 ("MDEA Decl.")
4. Declaration of David A. Thompson of Panasonic, dated August 3, 2009 ("Panasonic Decl.")
5. Declaration of Michael Moss of Samsung, dated August 5, 2009 ("Samsung Decl.")
6. Declaration of Francis Marella of Sharp, dated August 4, 2009 ("Sharp Decl.")
7. Declaration of Mark Small of Sony Electronics, dated August 6, 2009 ("Sony Decl.")
8. Declaration of William Taraday of ToteVision, dated August 3, 2009 ("ToteVision Decl.")
9. Declaration of Michael Droese of TTE Technology, Inc., dated August 4, 2009 ("TTE Decl.")
10. Declaration of Parker Brugge of CEA, August 4, 2009 ("CEA Decl.")
11. Declaration of Rick Goss of ITI, dated August 5, 2009 ("ITI Decl.")
12. Declaration of Christopher A. McLean of CERC, dated August 6, 2009 ("CERC Decl.")
13. Declaration of Daniel M. Butturini, MBA, dated August 4, 2009 ("Butturini Decl.")
14. Declaration of Mohan Rao, Ph.D., dated August 4, 2009 ("Rao Decl.")
15. Declaration of Professor Eric Williams, Ph.D., dated August 6, 2009 ("Williams Decl.")
16. Declaration of Michael G. Murphy, dated August 7, 2009 ("Murphy Decl.")

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Abdul Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985) 13

Artisan Mfg. Corp. v. All Granite & Marble Corp., 559 F. Supp. 2d 442 (S.D.N.Y. 2008)........ 11

Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000) 11, 12

Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362 (2d Cir. 2006) 21

C & A Carbone v. Clarkstown, 770 F. Supp. 848 (S.D.N.Y. 1991) 12

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).. 14

Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999) 19

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 18

Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993) 21

Conn. ex rel. Blumenthal v. Crotty, 180 F. Supp. 2d 392 (N.D.N.Y. 2001)................................ 16

Eastern Enters. v. Apfel, 524 U.S. 498 (1998)... 20, 21

Elrod v. Burns, 427 U.S. 347 (1976)... 11

Energy Reserves Group v. Kan. Power & Light, Co., 459 U.S. 400 (1983) 20

FCC v. Beach Commc'ns, 508 U.S. 307 (1993).. 18

Forest City Daly Hous., Inc. v. Town of N. Hempstead, 175 F.3d 144 (2d Cir. 1999) 11

Freedom Holdings, Inc. v. Cuomo, 592 F. Supp. 2d 684 (S.D.N.Y. 2009)................................. 14

Gary D. Peake Excavating Inc. v. Town Bd. of the Town of Hancock,
93 F.3d 68 (2d Cir. 1996).. 18

Gen. Motors Corp. v. Romein, 503 U.S. 181 (1992)... 21

Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60 (2d Cir. 2007)................................ 12

Grand River Enters. Six Nations, Ltd v. Pryor, 425 F.3d 158 (2d Cir. 2005) 14

Healy v. Beer Inst., 491 U.S. 324 (1989)... 14, 15

Kraft Foods N. America, Inc. v. Rockland County Dep't of Weights and Measures, 2003 U.S. Dist. LEXIS 2714 (S.D.N.Y. Feb. 26, 2003) 14, 16

Lovely H. v. Eggleston, 235 F.R.D. 248 (S.D.N.Y. 2006) 11

LTV Steel Co. v. Shalala, 53 F.3d 478 (2d Cir. 1995) 19

Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2009) 18

Metro. Taxicab Bd. Of Trade v. City of New York, 2008 U.S. Dist. LEXIS 94021 (S.D.N.Y. Oct. 31, 2008) 11

Motor Vehicle Mfrs. Ass'n v. Abrams, 720 F. Supp. 284 (S.D.N.Y. 1989) 15

Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652 (7th Cir. 1995) 15

Nemer Jeep-Eagle, Inc. v. Jeep Eagle Sales Corp., 992 F.2d 430 (2d Cir. 1992) 12

Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) 21

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 14, 16, 17

Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004) 18

Tom Doherty Assocs. v. Saban Entm't, Inc., 60 F.3d 27 (2d Cir. 1995) 12

United States Fid. & Guar. Co. v. McKeithen, 226 F.3d 412 (5th Cir. 2000) 20

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 21

Vance v. Bradley, 440 U.S. 93 (1979) 18

State Cases

N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337 (2003) 22

Akpan v. Koch, 75 N.Y.2d 561 (1990) 22

New York City Health & Hosps. Corp. v. McBarnette, 84 N.Y.2d 194 (1994) 24

Whitestone Bridge Drive-In Theatre, Inc. v. O'Connell, 217 N.Y.S.2d 371 (1st Dep't 1961) 24

Federal Statutes

U.S. Const. art. 1, § 8, cl. 3 14

U.S. Const. art. I, § 10 20

U.S. Const. amend. V, cl. 4 21

State Statutes and Regulations

N.Y. Const. art. IX, § 2(d) 24

N.Y. C.P.L.R. 7803 23

N.Y. Comp. Codes R. & Regs. tit. 6, § 617.5(c) 23

N. Y. Envtl. Conserv. Law § 8-0101 22

N.Y. Municipal Home Rule, art. 2, § 10.1(ii)(a)(12) 24

Municipal Laws and Regulations

New York City Administrative Code § 16-421 .... 6, 7

New York City Administrative Code § 16-422 .... 6, 7

New York City Administrative Code § 16-423 .... 7, 25

New York City Administrative Code § 16-424 8

New York City Administrative Code § 16-426 .... 6, 13

New York City Administrative Code §16-427 .... 7, 8

16 Rules of the City of New York § 17-01 .... 9, 19

16 Rules of the City of New York § 17-02 9

16 Rules of the City of New York § 17-03 .... *passim*

Miscellaneous

USEPA, *Electronic Waste Management in the United States: Approach 1* (July 2008) 10

NYCWasteLe$$,
http://www.nyc.gov/html/nycwasteelss/html/recycling/electronicsrecycling.shtml
(last visited August 6, 2009) 13

Plaintiffs Consumer Electronics Association ("CEA"), the Information Technology Industry Council ("ITI"), and ITAC Systems, Inc. ("ITAC") move this Court for a preliminary injunction against New York City's new electronics recycling law, N.Y.C. Administrative Code §§ 16-420, *et seq*. ("E-waste Law"), and the regulations promulgated by Defendant New York City Department of Sanitation ("DSNY") thereunder, R.C.N.Y. §§ 17-01, *et seq*. ("E-waste Rules", and collectively with the E-waste Law, the "E-waste Program" or "Program"). The Program seeks to impose unprecedented requirements on consumer electronics manufacturers with respect to the collection, handling, recycling and reuse of discarded electronic goods ("E-waste"). Plaintiffs are entitled to relief because the City's vast and overreaching E-waste Program, as Defendant Mayor Bloomberg has admitted, is "totally illegal" and unconstitutional, and imposes enormous burdens and costs on Plaintiffs that are occurring now.

CEA and ITI represent the interests of their over 2200 members across the world in the information technology and consumer electronics businesses who are damaged and face irreparable harm from the crushing mandates of this unconstitutional program. ITAC is a small domestic electronics products manufacturer struggling to survive in the current economic climate, and now suffers the additional burdens and costs imposed by the E-waste Program.

New York City ("NYC" or "City") is attempting to regulate electronics manufacturers' conduct worldwide. It has devised a program that is an order of magnitude more costly than any other E-waste program in the world. The Program imposes virtually all of the costs on manufacturers – ultimately these costs will be borne by consumers nationwide. In the absence of an injunction, Plaintiffs and hundreds of other companies will be forced to submit a comprehensive E-waste management plan ("E-waste Plan"), which requires each of them to develop an unprecedented waste management infrastructure, determine overall responsibility for products that multiple companies may have manufactured over the years, and negotiate and enter into binding contracts with recyclers, haulers and other third-parties in an attempt to comply with the E-waste Program. In support of this Motion, nine electronics companies and three trade associations representing the spectrum of the industry – ITAC, LG Electronics USA, Inc. ("LG"), Mitsubishi Digital

Electronics America, Inc. ("MDEA"), Panasonic Corporation ("Panasonic"), Samsung Electronics America, Inc. ("Samsung"), Sharp Electronics Corporation ("Sharp"), Sony Electronics Inc. ("Sony"), RGA & Associates, Ltd d/b/a ToteVision ("ToteVision"), TTE Technology, Inc. ("TTE"), CEA, Consumer Electronics Retailers Association ("CERC") and ITI, – have filed supporting declarations explaining their inability to meet the City's new requirements. In addition, three experts in electronics recycling, economics and New York City solid waste logistics have filed declarations explaining the unworkability of the E-waste Program and its incompatibility with principles of sustainable recycling.

The Plaintiffs, Plaintiffs' members and Declarants are dedicated to sound electronics recycling and have invested heavily in their own programs and in compliance with numerous state recycling mandates across the nation. The Defendants' E-waste Program, however, flouts principles of sustainable recycling, undermines existing nationwide voluntary E-waste programs, and is unconstitutional because it violates the dormant Commerce, Contract and Takings Clauses, and federal Equal Protection and Due Process rights, and violates New York state law.

PRELIMINARY STATEMENT

Defendant NYC's E-waste Program imposes mandates for collection, management and recycling of electronic goods on any person worldwide involved in the manufacture, assembly, branding, licensing, import or sale of a vast array of electronic goods sold *at any time* in the City, or sold in other jurisdictions and brought into the City. These persons are labeled "manufacturers" under the law. The Program requires that each of these entities (potentially hundreds of companies) build an unprecedented waste management infrastructure and deploy personnel and resources to collect, transport and recycle or reuse E-waste from any "person" in the City, a term that the law broadly defines to include "any individual, business entity, partnership, company, corporation, not-for-profit corporation, association, governmental entity, public benefit corporation, public authority or firm." The law compels manufacturers to *directly retrieve* from residences old televisions, computers, monitors, printers, and many other electronic devices weighing more than 15 pounds. Direct collection must be provided at the manufacturer's sole expense. For covered items 15 pounds

or less, manufacturers are individually responsible for establishing 59 drop-off points in the City for the equipment, or establishing a program for the packaging and mail-back of the electronic equipment at the manufacturer's sole expense. The Program's requirements extend to government offices, non-profit entities, and private companies. It mandates that a manufacturer collect any E-waste of any type that the manufacturer has ever made, sold or distributed, even if it is of a different brand than that manufacturer's brand. Collection and recycling services must be provided at *no charge or fee* to residents, government offices, non-profit entities, and private companies with 50 employees or less.

The sweeping dictates and reach of the E-waste Program exceed the City's legal authority under federal law and Plaintiffs are likely to succeed on their claims. As Defendant Bloomberg stated, the E-waste Program illegally regulates, burdens and discriminates against interstate commerce, in violation of the dormant Commerce Clause. The Program lacks a rational basis for arbitrarily excluding from regulation many categories of electronic equipment and "special" or "bulk" wastes (such as car batteries, appliances and other mercury-containing equipment) that contain the same metals and compounds that the City seeks to regulate, in violation of equal protection under the Fourteenth Amendment.

The E-waste Program also imposes joint and several, and retroactive liability on Plaintiffs and their member companies and hundreds of other businesses around the globe whose electronic equipment has come to rest in New York City. The retroactive application will effectively amend the terms of original contracts to impose new quasi-contractual obligations that were not contemplated nor considered at the time the contract was entered into or the good sold. LG Decl. ¶ 10; Panasonic Decl. ¶ 20. Defendants' imposition of joint and several, and retroactive liability violates Due Process, and the Contracts and Takings Clauses of the United States Constitution.

The E-waste Program also violates state law. Defendants' far reaching regulation of manufacturers' conduct beyond New York City's boundaries exceeds the City's police power authority. DSNY's failure to conduct any assessment of environmental impacts of the E-waste Rules, and specifically the mandates for direct collection of equipment from residences, violates the

procedural and substantive requirements of the State Environmental Quality Review Act ("SEQRA") and the City's counterpart – the City Environmental Quality Review ("CEQR").

In addition to the irreparable violations of their constitutional rights, the Program's requirement to submit and certify detailed E-waste Plans, including contractual commitments, to implement every aspect of this massive program will cause Plaintiffs to suffer economic and reputational damages that are difficult to calculate and are irreparable. As explained in the company and expert declarations, submitting compliant E-waste Plans is nearly impossible from a legal, logistical and business perspective. The City's broad definition of "manufacturer" – which includes any person who has ever assembled, manufactured, sold under its own brand name, licensed or imported CEE for sale in the City – means that multiple entities could be responsible for the same branded products. In addition, because many brands of televisions and other electronics equipment have passed through multiple owners over the last 30 years or more, manufacturers will have to sort through licensing agreements, indemnity agreements and successor liability issues to try to determine responsibility for certain brands. This is not only complicated and time-consuming for the manufacturers, but likely will cause significant consumer confusion as to which company is or is not responsible for certain items depending upon the brand, the year it was manufactured and whether the company is still in existence. *See* Sony Decl. ¶¶ 16-17; TTE Decl. ¶ 9 ("As there are other consumer electronics products sold under the RCA label by companies other than TTE, it will be extremely difficult, if not impossible, to finalize the numerous issues and agreements necessary for one company to take responsibility of each company's products and brands in New York City[.]").

In addition, each manufacturer must identify the specific contractors, personnel, and methods it will use to begin retrieving electronic goods across the City, including the contractual start and end dates. Each must also identify the fate and destination of the collected goods and how their recycling will comply with all City, state and federal laws. Manufacturers simply cannot responsibly and accurately marshal the necessary resources, conduct the due diligence on service providers, execute the necessary agreements and otherwise assemble the required information to complete and submit the required plan submission materials within the short time allotted. *See, e.g.,* Panasonic Decl. ¶ 12

(". . . DSNY has set deadlines for manufacturers to submit formal plans that are impractical and extreme when compared to other programs."); TTE Decl. ¶ 10 ("With millions of covered products having been manufactured by multiple companies over the last ten-to-fifteen years, obtaining definitive agreements between multiple companies to determine overall responsibility for each brand of electronics in New York could take many months, if not years, to resolve, assuming a resolution that is compliant with the City's E-waste Program is even possible."). Therefore, Plaintiffs will be forced to contract with third parties and incur massive costs to directly collect certain electronic items from residences for free, and increase the prices of their goods nationwide so as not to constitute a forbidden fee on New York City residents in an attempt to offset the costs of NYC's Program. *See, e.g.,* Sharp Decl. ¶ 11 ("[T]he excessive costs of the City's E-waste program ultimately will be borne by consumers everywhere, not just in New York City."). Some manufacturers may never be able to submit the required plan. *See, e.g.,* ToteVision Decl. ¶ 4 ("[B]ecause of the way the law is structured, ToteVision may never be able to submit a fully compliant plan."); ITAC Decl. ¶ 21.

Failure to comply with the E-waste Program requirements not only subjects a manufacturer to a penalty of $1000/day, but will damage Plaintiffs' and other manufacturers' goodwill and reputations, while attempting to comply may drive certain Plaintiffs and manufacturers like Plaintiff ITAC and Declarant ToteVision out of business. Plaintiffs and other manufacturers estimate that their damages from the City's illegal E-waste Program will exceed $200 million per year. Butturini Decl. ¶ 22. The costs associated with the NYC program are projected to be, on a per pound basis, more than ten times greater than the E-waste collection and recycling programs in California and Maine. Rao Decl. ¶ 10.

A preliminary injunction will not disturb the status quo. Under the E-waste Program, City residents are not required to cease curbside disposal of electronics with other solid waste until July 2010, thus allowing ample time for a determination on the merits of the legality of the program. Discarded electronics can continue to be managed under existing voluntary recycling programs. There is no countervailing risk to the environment from a brief delay in the implementation of this illegal, unconstitutional, expensive and ineffective program.

FACTS

A. Defendant Mayor Bloomberg Vetoes a Portion of the Original Law

In April/May of 2008, the New York City Council passed a two-part (originally, a single bill) electronic waste recycling law, Local Laws Nos. 13 and 21 (adding and amending Chapter 4-A to Administrative Code of the City of New York §§ 16-420 to 432 ("NYC Code")). Previously, Defendant Mayor Bloomberg stated that the proposed law was "totally illegal" and openly opined that the "law violates a whole bunch of federal laws on interstate commerce." *See* Ex. 2, attached to the Declaration of Michael G. Murphy, dated August 7, 2009 ("Murphy Decl."). Defendant Bloomberg further explained:

> The trouble with this law that the City Council passed is that you hold the manufacturers responsible for the public to recycle and the manufacturers can't do that. They don't sell directly to the public in many cases, they sell to wholesalers, and the wholesalers, you're not holding them responsible, but also it's the individual's responsibility.

Id.

Defendant NYC, through its City Council, ignored Mayor Bloomberg's admonitions, and simply broke the original bill into two components (*i.e.*, Local Laws Nos. 13 and 21). Defendant Bloomberg ultimately signed Local Law 13 into effect and vetoed Local Law 21 (the portion that established mandatory performance standards for volumes of recycling and penalties), but the veto was overridden. *See* Murphy Decl., Exs. 3 & 4.

B. E-waste Law Requirements

The E-waste Law imposes upon only "manufacturers" the obligation to collect, handle, and recycle or reuse "covered electronic equipment" ("CEE"). NYC Code § 16-422. The law prohibits residents from disposing of CEE as solid waste beginning on July 1, 2010. *Id.* § 16-426. However, the burdens on manufacturers are both immediate and retroactive. The law's retroactive reach begins with its definition of manufacturer, which includes any person who has ever assembled, manufactured, sold under its own brand name, licensed or imported CEE for sale in the City. *Id.* § 16-421(g). CEE includes computer central processing units, cathode ray tubes, keyboards, electronic mice or similar pointing devices, televisions, printers, computer monitors, laptops, and portable

digital music players with memory capability. *Id.* §16-421(d). Accordingly, CEE includes millions of pieces of electronic equipment that are found in a large majority of New York City homes, offices, and other buildings. Butturini Decl. ¶ 27. The City Council arbitrarily excluded from the definition of CEE a variety of other common household and office electronics products such as cable set top boxes, cameras and household appliances even though these products have circuit boards and other components identical to CEE. NYC Code § 16-421(d).

The E-waste Law requires each manufacturer to submit an E-waste Plan, and under the recently promulgated regulations, this requires a commitment to all facets of work needed to comply with the E-waste Program. *Id.* § 16-423. A manufacturer that fails to submit a compliant E-waste Plan is subject to a penalty of $1000 per day. *Id.* § 16-427(d). The E-waste Law prohibits a manufacturer from imposing any fee or charge whatsoever on a person or entity to collect, handle and recycle or reuse CEE, with the sole exception of for-profit businesses with more than 50 employees. *Id.* § 16-423(c).

A manufacturer must collect and accept its own CEE brand products, regardless of whether the person is purchasing another product in exchange, and regardless of the jurisdiction where or the circumstances under which the product was originally sold. *Id.* § 16-422(a). A manufacturer must collect and accept any CEE product on a one-to-one basis with the resident's purchase of the same type of CEE, regardless of the brand name origin or size. *Id.* § 16-422(b). After July 1, 2011, even without a purchase, a manufacturer must collect and accept "orphan waste", where the original manufacturer is known but is no longer in business or where the original manufacturer cannot be identified. *Id.* § 16-422(c). Significantly, wholesalers, distributors and/or retailers who actually held legal title to these now orphan products will have no responsibility whatsoever for the "orphan waste" under the City's E-waste Program, even though they owned, controlled, transported and presumably profited from the sale of these orphan products. Consequently, if a manufacturer *ever assembled, manufactured, distributed or imported* a type of CEE that happened to be sold in the City, or was subsequently transported into the City by its owner after initial sale, it will have the obligation

to collect that same type of CEE *even if it no longer assembles, manufactures, distributes or imports* any CEE.

Thus, a manufacturer such as ToteVision, a small Seattle-based manufacturer of small high definition LCDs with TV tuner functionality, will be required, at the time it sells one of those items, to collect, manage and recycle or reuse in accordance with the E-waste Program any size television from any manufacturer—such as a large, 100-plus pound old-style tube television—offered by a resident at ToteVision's sole cost and expense. ToteVision Decl. ¶ 13. ToteVision would be subject to a $2000 penalty for each television it did not accept. NYC Code § 16-427(d)(4).

The E-waste Law also requires the manufacturer to meet specific "performance standards," which require a manufacturer to annually collect and recycle a minimum percentage of its average annual sales, by weight. *Id.* § 16-424. By July 1, 2012, a manufacturer is required to collect 25% of its average annual sales in the City; by July 1, 2015, the standard is raised to 45%; and by July 1, 2018, a manufacturer is required to collect 65%. *Id.* The performance standards do not take into account that manufacturers have no ability to compel participation in its plan or otherwise control how or when a person in the City discards or disposes of its private property. Yet, a manufacturer will be subject to a $50,000 penalty for each percentage point that the manufacturer falls below the standard. *Id.* § 16-427(d)(5). This flat and regressive penalty imposes particular burdens on small manufacturers.

C. The E-waste Rules

On April 15, 2009, DSNY finalized the E-waste Rules to implement the E-waste Law.[1] *See* Murphy Decl., Ex. 5. As explained in several declarations submitted in support of this Motion, even with the due date for proposed plans extended to 30 days after an Order of the Court, this length of time is still significantly less time to implement a program than the time period other jurisdictions allotted for less onerous recycling programs. *See, e.g.,* LG Decl. ¶ 24; Panasonic Decl. ¶¶ 12-14.

[1] Plaintiffs CEA, ITI and ITAC and Declarant CERC submitted comments on the regulations when they were first proposed. *See* Murphy Decl., Exs. 8 & 9; ITAC Decl. ¶ 10; CERC Decl. ¶ 8.

Moreover, the requirement to submit plans became far more onerous when the Department released plan submission materials that manufacturers must use to submit their E-waste Plans.[2]

The E-waste Rules go far beyond the E-waste Law by imposing an extreme and oppressive interpretation of the Law's requirement that collection of electronic equipment be "convenient" for residents. DSNY unilaterally determined that convenient collection of any CEE[3] weighing over 15 pounds requires each covered manufacturer to retrieve the CEE directly from a person's residence and not curbside upon demand (the "Direct Collection" requirement). 16 RCNY § 17-03(h)(2)(i)(B). Similar services or other "reasonably accessible" methods must be provided to businesses, governmental units and not-for-profit corporations. *Id.* § 17-03(h)(2)(ii). For "small" items 15 pounds or less, "convenient" collection is a mail-back program and/or a drop-off program. *Id.* § 17-03(h)(2)(i)(A). Each covered manufacturer must provide at least 59 drop off locations throughout the City if it elects to offer only a drop-off program for such items. *Id.* Except for for-profit businesses with more than 50 full-time employees, all of these services (including Direct Collection) must be provided at no charge. *Id.* § 17-02(c). The E-waste Rules prohibit a person from leaving CEE on the curbside, in contrast with the current practice of Defendant DSNY. *Id.* § 17-03(h)(2)(i)(B).

[2] The E-waste Plan submission materials are lengthy and complicated, and require detailed information about, among other things (i) the manufacturer's brands, (ii) its brand categories, (iii) the manner in which the company qualifies as a manufacturer under the law for each brand, (iv) the types of CEE under each brand name, (v) dates the brands and/or products were sold, (vi) three years of sales data (by weight) for each type of CEE sold in the City, (vii) the methods used by the manufacturers to collect New York City specific sales data, (viii) a description of the means by which the manufacturer sells or has sold CEE and the categories of persons to whom they are or were sold, (ix) a description of how the manufacturer intends to inform the public of its plan including point of sale information, (x) full contact and other information of each party performing the manufacturer's collection and/or transportation operations, with an organization verification, (xi) detailed information on mail back service to be provided, (xii) detailed information on drop-off service to be provided, including information on permanent and non-permanent drop-off sites, and (xiii) detailed information on how CEE collection will be performed. *See* Murphy Decl., Ex. 12.

[3] DSNY also excluded from the program (without any explanation) additional electronic equipment that contain the same materials as CEE that the City alleges poses environmental risks, including video game systems, GPS devices, marine equipment, digital video recorders, cash registers, portable DVD players, digital picture frames, certain audio equipment and universal serial bus devices. 16 RCNY § 17-01.

According to an U.S. Environmental Protection Agency ("USEPA") study on electronics waste management, upwards of 95% of all televisions and most desktop computers in New York City will exceed the "small item" 15-pound weight threshold and will be subject to Direct Collection. USEPA, *Electronic Waste Management in the United States: Approach 1* (July 2008); Butturini Decl. ¶ 17. This will result in the Plaintiffs and other manufacturers directly collecting an estimated 1.29 million televisions, computers, and other electronic equipment in New York City, totaling over 47.9 million pounds per year. Butturini Decl. ¶ 17. Direct Collection will cost the manufacturers approximately $121, and potentially more, per pick-up from a City residence. Butturini Decl. ¶ 13. ToteVision, for example, which manufactures a small high definition LCD monitor with TV tuner functionality – a 10.4 inch screen weighing only approximately 3.3 pounds – now can be forced to retrieve and recycle a 52-inch television they never owned or sold, which can weigh anywhere from 80 to more than 100 pounds, because they are of the same "type". This obligation could drive ToteVision out of business. ToteVision Decl. ¶ 13; *see also* Panasonic Decl. ¶ 19 ("[T]he E-waste Rules will cause the cost of each unit collected to exceed any profit derived from the original sale of the unit, thereby resulting in a crushing financial burden on Panasonic.").

Even though Defendant Bloomberg previously concluded that they were illegal and unconstitutional, a manufacturer's E-waste Plan must describe "how the manufacturer intends to achieve the [E-waste Law's] performance standards." *Id.* § 17-03(h)(9). Manufacturers are struggling to determine how to meet these standards, which ultimately would require them to somehow "'force' City residents to recycle their products." MDEA Decl. ¶ 16; *see also* LG Decl. ¶ 23 ("If a collection system is in place, residents will decide to use it or they will decide not to use it. LGEUS has no control over that decision."); ToteVision Decl. ¶ 15 ("ToteVision cannot possibly determine when these products will be 'collectible' such that its ability to meet these performance standards is in its own control.").

As crafted, the E-waste Program interferes with and jeopardizes many existing, effective, voluntary nationwide electronic recycling programs. Samsung Decl. ¶¶ 10-12; Sony Decl. ¶ 25. For example, Sony's current nationwide voluntary recycling program includes all Sony brand items and

is not limited to those devices designated as CEE under NYC's E-waste Program. However, because the annual cost to comply with the E-waste Program will exceed the total costs of Sony's successful nationwide recycling program, Sony will be compelled to change its voluntary nationwide program to meet the requirements of the City's program. Sony Decl. ¶ 26.

STANDARD FOR PRELIMINARY INJUNCTION

To secure a preliminary injunction, the moving party must ordinarily show "(1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships tipping decidedly in its favor." *Forest City Daly Hous., Inc. v. Town of N. Hempstead,* 175 F.3d 144, 149 (2d Cir. 1999); *Artisan Mfg. Corp. v. All Granite & Marble Corp.,* 559 F. Supp. 2d 442, 449 (S.D.N.Y. 2008) (Pauley, J.). However, "[w]here a preliminary injunction is sought against government action . . . the less-demanding 'fair ground for litigation' standard is inapplicable, and therefore a 'likelihood of success' must be shown." *Id.* This Court routinely has granted preliminary injunctions enjoining government programs to allow full litigation before rights and economic interests will be damaged. *See, e.g., Metro. Taxicab Bd. Of Trade v. City of New York,* 2008 U.S. Dist. LEXIS 94021, at *10-11 (S.D.N.Y. Oct. 31, 2008) (Crotty, J); *Lovely H. v. Eggleston,* 235 F.R.D. 248, 259 (S.D.N.Y. 2006) (Swain, J.).

ARGUMENT

I. THE E-WASTE PROGRAM WILL IRREPARABLY HARM PLAINTIFFS AND OTHER MANUFACTURERS

Plaintiffs will suffer *per se* irreparable harm meriting a preliminary injunction because of the multiple constitutional violations of the E-waste Program. The threat of or the actual deprivation of a party's constitutional rights, privileges or immunities constitutes irreparable harm *per se*. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *see also Brewer v. West Irondequoit Cent. Sch. Dist.,* 212 F.3d 738, 744-45 (2d Cir. 2000) ("[P]laintiffs have met their burden of showing irreparable harm because the deprivation alleged involves a constitutional right"). Here, Plaintiffs have alleged that the E-waste Program, if implemented and enforced, would violate their rights, privileges and immunities

under the Commerce, Takings and Contract Clauses of the U.S. Constitution, as well as violate their rights to due process and equal protection under the 14th Amendment. *See* Murphy Decl., Ex. 1, ¶¶ 146-183. For this reason alone, Plaintiffs have demonstrated that they will suffer irreparable harm *per se*. *Brewer,* 212 F.3d at 745.

Moreover, the Second Circuit consistently has found "irreparable harm where a party is threatened with the loss of a business." *Tom Doherty Assocs. v. Saban Entm't, Inc.,* 60 F.3d 27, 37 (2d Cir. 1995). Thus, where the "loss of a product will cause the destruction of a business itself or indeterminate losses in other business, the availability of money damages may be a hollow premise and a preliminary injunction appropriate." *Id.* at 38. Similarly, irreparable harm exists where it is not possible to measure plaintiff's actual loss of customers or goodwill that would result, *C & A Carbone v. Clarkstown,* 770 F. Supp. 848, 854 (S.D.N.Y. 1991) (Brieant, J.), or where the calculation of damages would be purely speculative, *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.,* 992 F.2d 430, 436 (2d Cir. 1992). It is also well-established that the loss of sales or market share may constitute irreparable harm. *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2d Cir. 2007).

Here, all of these types of irreparable harm exist. First, irreparable harm is established because of the severe, diverse and permanent business impacts of the E-waste Program. Some smaller electronic businesses with only tangential ties to the City are ensnared in the Program's requirements, threatening their viability. Plaintiff ITAC Systems has stated that complying with the E-Waste Program will "easily exceed any revenue ITAC derives from New York City sales" and as a "small company with very limited resources and personnel . . . [it] simply cannot afford to devote the necessary funds and time to meet the onerous requirements of [the E-waste Program]." ITAC Decl. ¶¶ 11, 12; *see also* MDEA Decl. ¶ 13 (MDEA "simply [does] not have the funds to finance a [Direct Collection] program" and such a program could cause [MDEA] to consider leaving the TV business.).

Second, the E-waste Program will harm Plaintiffs, their members and other manufacturers' business relationships and goodwill. Consumers will be confused, dissatisfied and frustrated by the

complex and burdensome E-waste Program, which likely will result in the loss of hundreds of manufacturers' goodwill and business, as they will be the companies associated with the collection of CEE. *See* Sony Decl. ¶¶ 16, 17 (a manufacturer's product will be subject to "inconsistent standards and different recycling programs," and consumers will have to figure out the "responsible" manufacturer which will be dependent upon the brand, the year it was manufactured and whether the company is still in existence); TTE Decl. ¶¶ 18, 19 (TTE will have to modify business practices to ensure compliance, which could result in a "loss of market share as well as regional customers/retailers" and any failure to comply with the requirements will affect TTE's business reputation and goodwill). Third, the Program also will likely reduce certain manufacturers' market share due to the potential to give other manufacturers a "significant competitive advantage in complying with the Program" and "artificially create a competitive imbalance favoring certain manufacturers." Rao Decl. ¶¶ 11, 13; *see also* Samsung Decl. ¶ 20.

Allowing enforcement of the E-waste Program pending a final determination of the merits of this case will have immediate and cascading economic impacts on hundreds of companies as they are forced to dedicate significant resources to develop an E-waste Plan. In contrast, temporarily enjoining the deadline for plan submissions will have no adverse impacts on the City. The preliminary injunction would not defeat the overall purpose of the E-waste Program because the ban on residential disposal of E-waste does not take effect until July 1, 2010. NYC Code § 16-426. Even with an injunction, residents and consumers will still be able to utilize the voluntary programs sponsored by many manufacturers and retailers (as well as charities) that will remain in effect. *See e.g.*, LG Decl. ¶ 6; Panasonic ¶ 8; Samsung Decl. ¶¶ 8-10; Sharp Decl. ¶¶ 6-7; Sony Decl. ¶¶ 23-26; *see also* NYCWasteLe$$, http://www.nyc.gov/html/nycwasteelss/html/recycling/electronicsrecycling.shtml (last visited August 6, 2009).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

To establish likelihood of success on the merits, the movant "need not show that success is an absolute certainty. He need only make a showing that the probability of his prevailing is better than

fifty percent. There may remain considerable room for doubt." *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1025 (2d Cir. 1985). Plaintiffs' eight count Complaint readily satisfies this standard.

A. The E-waste Program Violates The Dormant Commerce Clause

The Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, prohibits state and local laws and regulations that unduly interfere with interstate commerce. *See Kraft Foods N. America, Inc. v. Rockland County Dep't of Weights and Measures,* 2003 U.S. Dist. LEXIS 2714, * 25 (S.D.N.Y. Feb. 26, 2003) (Pauley, J.). The rationale underlying the Commerce Clause's restriction on the power of local and state governments – which is referred to as the "dormant Commerce Clause"– is that interstate commerce should be uniformly regulated throughout the nation, and such uniformity is only possible when the power to regulate interstate commerce is committed exclusively to Congress. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (the Commerce Clause endeavors to prevent the enactment of laws "that would excite those jealousies and retaliatory measures the Constitution was designed to prevent").

As the Second Circuit has explained, local laws may violate the dormant Commerce Clause in three distinct ways:

> First, a statute that clearly discriminates against interstate commerce in favor of intrastate commerce is virtually invalid *per se* and can survive only if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. Second, if the statute does not discriminate against interstate commerce, it will nevertheless be invalidated under the *Pike [v. Bruce Church, Inc.*, 397 U.S. 137 (1970)] balancing test if it imposes a burden on interstate commerce incommensurate with the local benefits secured. Third, a statute will be invalid *per se* if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.

Grand River Enters. Six Nations, Ltd v. Pryor, 425 F.3d 158, 168 (2d Cir. 2005); *see also Freedom Holdings, Inc. v. Cuomo*, 592 F. Supp. 2d 684, 705 (S.D.N.Y. 2009) (Hellerstein, J.).

1. The E-waste Program Improperly Controls Commerce In Other States.

The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). In short, a court "will not hesitate to strike down a state law shown to have extraterritorial scope and an adverse impact on commerce occurring wholly outside the enacting state." *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995). Thus, a law that "has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Healy,* 491 U.S. at 332.

The E-waste Program violates the extraterritoriality prong of the dormant Commerce Clause because it controls the conduct of companies with no ties to NYC other than that products sold long ago somehow made their way into the City. Manufacturers must collect CEE regardless of where the item was originally distributed and purchased, as long as the CEE is discarded by any "person" in New York City. Moreover, even small manufacturers with no business presence in New York City, such as Plaintiff ITAC and Declarant ToteVision, must complete E-waste Plans and submit themselves to the City's authority because they know that through integrated distribution channels for electronic goods some small quantity of their products likely are or will be present in New York City, or face potentially severe and crippling penalties. *See* ITAC Decl. ¶¶ 12, 19; ToteVision Decl. ¶¶ 10-11. A manufacturer could not choose to limit its exposure by discontinuing the sale of CEE in the City because the E-waste Program does not limit its scope to CEE purchased in the City, but rather encompasses CEE sold anywhere, as long as it is being discarded in the City. *See, e.g.,* ITAC Decl. ¶ 19 (rejecting New York City sales orders "would not remove [ITAC] from the law's requirements anyway since ITAC products . . . [sold] in other jurisdictions could eventually be generated as waste in the City.").

New York federal district courts have struck down similar laws based on their extraterritoriality. In *Motor Vehicle Mfrs. Ass'n v. Abrams*, 720 F. Supp. 284, 288 (S.D.N.Y. 1989)

(Sand, J.), this Court found a provision in New York's "Lemon Law" unconstitutional because it required out-of-state car dealers to forward written notice to manufacturers of any problems reported by owners of New York-registered vehicles. The Court held that because the Lemon Law "require[d] that agents or dealers outside New York send manufacturers written notice of owners' complaints, it is *per se* in violation of the Commerce Clause." *Id.*; *see also Conn. ex rel. Blumenthal v. Crotty*, 180 F. Supp. 2d 392, 397-400 (N.D.N.Y. 2001) ("the effect of the [state regulation] is to impermissibly regulate the commercial lobster trade beyond the borders of New York State.").

2. The E-waste Program Improperly Burdens Interstate Commerce

A law that burdens interstate commerce may be unconstitutional if it is clearly excessive in relation to the putative local benefits. *See Pike*, 397 U.S. at 142. In applying the *Pike* balancing test, courts consider "the nature of the local interest involved" and "whether it could be promoted as well with a lesser impact on interstate activities." *Id.*; *see also Kraft,* 2003 U.S. Dist. LEXIS at *31 (holding that county net weight labeling rule violated the dormant Commerce Clause because the regulation unduly burdened interstate commerce in relation to the putative local benefit).

Here, the E-waste Program unquestionably burdens interstate commerce. The Program constitutes, by far, the most onerous and expensive electronics recycling mandate enacted to date in the United States, imposing *collection costs* that are ten times more expensive than the *total cost of collection through recycling* of other E-waste programs in California and Maine. Rao Decl. ¶ 10. As discussed above at pp. 2–10, the burdens of this unprecedented program, requiring every electronics company to operate a collateral waste collection, transportation, and recycling business, are staggering. As a mere sample, the company declarations submitted herewith spell out in detail the current and imminent burdens they face. Moreover, Defendants did not give any consideration to the burdens imposed on small volume manufacturers, such as ITAC and ToteVision. Although these manufacturers typically generate a relatively small amount of annual revenue, they must comply with all of the E-waste Program's requirements, or face potentially ruinous penalties.

Similarly, large manufacturers will incur substantial costs trying to comply with the City's Program that inevitably will unduly burden interstate commerce. *See Kraft,* 2003 U.S. Dist. LEXIS

at *31 (finding that rule placed a heavy burden on interstate commerce without equally weighty benefits because to comply with local law "would be time consuming and costly to a national manufacturer whose packaging and labeling systems are designed to comply with federal laws"); *see also* CERC Decl. ¶¶ 10-13 (describing cascading adverse effects on retailers and consumers). Based on Sharp's experience with other E-waste programs, Sharp estimates that the costs to comply with New York City's program will be approximately $1.7 million per year. Sharp Decl. ¶ 9. Sony has estimated that its costs to comply could be $10 million or more per year. Sony Decl. ¶ 13. In order to recoup these expenses, and in particular the expenses associated with Direct Collection, Sharp, Sony, and other manufacturers will be forced to raise prices on their goods. However, because of the prohibition from imposing a fee on New York City residents, the increased costs must be imposed nationwide, substantially affecting all distributors, retailers and ultimately consumers outside of New York City. Samsung Decl. ¶¶ 14, 15; Sony Decl. ¶ 13. The structure of the New York City program ensures that consumers outside the City will subsidize virtually all of the costs of the program. *See* Sharp Decl. ¶ 11 (explaining how California consumers, who already support that state's program, now will be forced to subsidize the NYC Program).

By contrast, the benefits New York City receives from implementation of such a draconian program versus a more reasonable program are relatively small and could be readily addressed by other less onerous means. The E-waste Program was intended to provide environmental benefits and be convenient to consumers. Local Law No. 13 § 1. Yet, the Program as promulgated by the Department, and in particular Direct Collection, is neither environmentally beneficial nor convenient to residents because many New York City residents will have to schedule with each manufacturer a pick up time and then will have to be present at the time of pick-up. *See* Williams Decl. ¶¶ 15-17; Rao Decl. ¶ 10, 21-23. Shockingly, DSNY did not undertake any assessment of the impacts of program requirements such as the 15-pound weight threshold or the Direct Collection mandate, *see, e.g.,* Murphy Decl., Exs. 6 & 14, and most certainly failed to consider whether the goals of the Program "could be promoted as well with a lesser impact on interstate activities." *Pike,* 397 U.S. at 142. Programs in other states, the European Union, and Japan, in many cases serving densely

populated areas like NYC, have been able to achieve the environmental benefits of E-waste recycling without imposing the onerous and burdensome requirements found in the City's E-waste Program. Williams Decl. ¶ 17.

3. The E-waste Program Discriminates Against Interstate Commerce

Regulations that advantage local businesses versus their out-of-jurisdiction competitors, whether on their face or in effect are *per se* invalid unless the locality can make a compelling showing that this was the only means to achieve a strong local need. *Swedenburg v. Kelly,* 358 F.3d 223, 238 (2d Cir. 2004). A law is discriminatory in effect if it places "any burdens on out-of-state [interests] that are not imposed on [in-state interests]." *Gary D. Peake Excavating Inc. v. Town Bd. of the Town of Hancock,* 93 F.3d 68, 74 (2d Cir. 1996).

Here, the E-waste Program discriminates against non-resident manufacturers by providing those manufacturers that have a presence in New York City a clear competitive advantage. Rao Decl. ¶¶ 19-22. Manufacturers that have a presence in New York City will have a distinct cost advantage in complying with the Rules because they already have an infrastructure of retail outlets and delivery/service vehicles in place to meet the Direct Collection requirement. Rao Decl. ¶ 12. The costs to out-of-city manufacturers will be significantly higher, since they will have to build a new collection infrastructure in the City. Rao Decl. ¶ 21.

B. The E-waste Program Violates the Equal Protection and the Due Process Clauses

The E-waste Program violates CEE manufacturers' Equal Protection and Substantive Due Process rights by treating similarly situated companies differently and by failing to pursue a rational means to achieve the goals of electronic waste recycling. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446 (1985) (invalidating zoning legislation because classification was not rationally related to a legitimate governmental purpose).

1. The Program Violates the Equal Protection Clause

The Equal Protection Clause prohibits the government from treating one class of persons different from another without a "rational basis." *FCC v. Beach Commc'ns*, 508 U.S. 307, 313

(1993). A "rational basis" exists if there "is some reasonably conceivable state of facts that could provide a rational basis for the legislative action." *Maloney v. Cuomo*, 554 F.3d 56, 59 (2d Cir. 2009) (internal quotations omitted). If, however, the law lacks any "plausible" rational basis or if "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker," then the law is unconstitutional. *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Without any explanation, much less a rational basis, the E-waste Program treats manufacturers of CEE differently than similarly situated manufacturers of other consumer electronic products such as video game systems, GPS devices, digital video recorders, portable DVD players, and certain audio equipment, and "special" wastes, such as car batteries, mercury-containing equipment, refrigerators, microwaves, air conditioners and other common household appliances. 16 RCNY § 17-01. Thus, manufacturers of non-CEE will have no obligations under the Program, and residents will be allowed to continue to dispose of such products as solid waste, without any burdens imposed on manufacturers of those products. Murphy Decl., Ex. 1, ¶¶ 127-130. For certain special wastes, residents will still be required to bring them to designated drop-off centers in the City without imposing any obligations on those manufacturers. *Id.* By contrast, the E-waste Rules prohibit any person from leaving CEE on the curb-side for pick-up by the Department and require these manufacturers to collect, free of charge, used CEE greater than 15 pounds directly from residents' homes. 16 RCNY § 17-03(h)(2)(B). In creating this arbitrary distinction between manufacturers of CEE and manufacturers of special or other electronic wastes, the E-waste Rules isolate CEE manufacturers, forcing them to assume waste collection responsibilities typically handled by municipalities and consumers and to bear all of the associated costs. *See, e.g.,* Sharp Decl. ¶ 10; Butturini Decl. ¶ 9 ("[T]he NYC e-waste program effectively forces manufacturers to assume the role of a waste management/recycling expert, an urban transportation/logistics specialist, and a risk manager.").

2. The Program Violates Plaintiffs' Rights to Due Process

The Due Process Clause of the Fourteenth Amendment requires laws "adjusting the benefits and burdens of economic life" to have a rational basis. *LTV Steel Co. v. Shalala* ("*In re Chateaugay*

Corp."), 53 F.3d 478, 486 (2d Cir. 1995). In other words, such legislation must be "supported by a legitimate legislative purpose furthered by a rational means." *Id.* Rational review is not a "rubber stamp." *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999).

While the City's goal of ensuring the "safe and environmentally sound handling, recycling, or reuse of electronic equipment" may be a legitimate governmental purpose, Local Law No. 13 § 1, the means chosen by the City and DSNY to effectuate this purpose are arbitrary and irrational, as well as grossly inefficient. The E-waste Program violates due process by placing all of the responsibility for dealing with unwanted CEE on manufacturers, including waste to which they never held title. This approach to dealing with unwanted consumer goods as popular and ubiquitous as consumer electronics is fundamentally unfair and irrational. A company like TTE sells CEE primarily to national retailers and has no ability to direct or limit where its products are used or sold.

Inexplicably, the E-waste Program disregards such facts and requires the manufacturer to take possession of the item, at times by directly picking them up from residents – a method they themselves admitted was "cost prohibitive" due to "high labor and transportation costs"[4] – and therefore contravenes "fundamental principles of fairness" inherent to due process. *E. Enters. v. Apfel,* 524 U.S. 498, 537 (1998) (plurality opinion). Plaintiffs and other manufacturers must assume liability unrelated to their own actions. *United States Fid. & Guar. Co. v. McKeithen*, 226 F.3d 412 (5th Cir. 2000) (invalidating a state law that imposed unforeseen liability to companies that did not contribute to the problem the legislation sought to address).

C. The E-Waste Program Imposes Retroactive Liability Violating the Contract, Takings and Due Process Clauses of the United States Constitution

The retroactive liability imposed here violates a number of constitutional provisions. The Contracts Clause places limits on coercive regulatory programs. It prohibits any state, or subdivision thereof, from passing a law "impairing the Obligation of Contracts." U.S. Const. art. I, § 10. A law violates the Contract Clause if: (1) the regulation substantially impairs a contractual relationship –

[4] *See* Murphy Decl., Ex. 10. When Defendants were notified of this admission, they promptly changed the website. *Id.,* Ex. 11. *See also id.*, Ex. 1, ¶¶ 52-54.

"[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment"; (2) the State does not "have a significant and legitimate purpose behind the regulation, such as the remedying of a broad and general social or economic problem;" and (3) the law is not reasonable or appropriate for its intended purpose. *Energy Reserves Group v. Kan. Power & Light, Co.*, 459 U.S. 400, 411-13 (1983) (citations omitted).

Likewise, a regulation that "goes too far" can constitute a regulatory taking. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006); U.S. Const. amend. V, cl. 4. The purpose of the Takings Clause is to prevent the government from "forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *E. Enters.,* 524 U.S. at 522 (quotations omitted). In *Eastern Enterprises*, the Supreme Court invalidated the Coal Act of 1992, which imposed retroactive liability for guaranteed lifetime medical benefits to retired coal miners on their former employers. The Supreme Court listed several factors that helped determine whether a taking had occurred: 1) "[t]he economic impact of the regulation on the claimant"; 2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and 3) "the character of the governmental action." *Id.* at 124.

Harsh retroactive legislation like the E-waste Program also violates Due Process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976) ("The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."); *E. Enters.,* 524 U.S. at 549 (Kennedy, J., concurring) (stating that the Act violated due process because, *inter alia,* "in creating liability for events which occurred 35 years ago [the Act] has a retroactive effect of unprecedented scope."). Simply put, "retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). A key question in determining whether retroactivity violates Due Process is whether the plaintiff could have reasonably expected that it

would face regulatory exaction for its conduct. *See Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 646 (1993).

Here, the E-waste Program imposes precisely the sort of retroactive liability that violates the Takings and Contracts Clauses and offends Plaintiffs' Due Process rights. The E-waste Program, with its unlimited retroactive reach, fundamentally alters the terms of the original contract of sale for a CEE between the manufacturer and the consumer (or distributor, retailer, etc. as the case may be). *See* LG Decl. ¶¶ 11-12; Panasonic Decl. ¶ 20. Prior to the enactment of the E-waste Program, a manufacturer sold the CEE for a certain price, with the clear expectation that it would not be required to take title to the product again at the end of its useful life. Manufacturers could not have reasonably expected to be subject to the regulatory requirements of the E-waste Rules at the time they produced and sold consumer products. The sales price of the CEE at that time could not have reflected the cost to collect, handle, and recycle or reuse the CEE. *See, e.g.,* LG Decl. ¶¶ 11-12, Panasonic Decl. ¶ 20.

D. DSNY's Failure to Assess Potential Environmental Impacts Prior to Finalizing the E-waste Rules Violates SEQRA and CEQR

In New York, all state and local governmental agencies must assess the environmental effects of their discretionary actions *before* they make final determinations on those actions. Environmental Conservation Law ("ECL") § 8-0101 *et seq.* SEQRA requires "strict compliance with its procedural mandates so that agencies will err on the side of meticulous care in their environmental review and so that they do not cut corners at the ultimate expense of the environment." *N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone ("Vallone")*, 100 N.Y.2d 337, 350 (2003) (lead paint law overturned for failure to comply with SEQRA). Substantively, an agency must take a "hard look" at all relevant areas of environmental concern and make a reasoned elaboration of the basis of its findings regarding environmental impacts. *Akpan v. Koch*, 75 N.Y.2d 561 (1990).

In promulgating the E-waste Rules, DSNY failed to comply with any of the substantive or procedural requirements of SEQRA or CEQR.[5] The first SEQRA-related document that DSNY

[5] On March 11, 2008, the City Council issued a negative declaration based on a superficial Environmental Assessment Statement prepared for the E-waste Law. Murphy Decl., Ex. 14. Plaintiffs are not challenging the City Council's negative declaration as the E-waste Law does not

(Continued …)

prepared in relation to the E-waste Rules was an internal memorandum (the "DSNY Internal Memo"), dated May 7, 2009 – three weeks after the E-waste Rules were finalized. Murphy Decl., Ex. 6. Incredulously, DSNY concluded after the fact that adoption of the rules constituted a Type II action – and therefore was not subject to SEQRA review – because, according to DSNY, it qualified as either "routine or continuing agency administration and management, not including new programs or major reordering of priorities that may affect the environment," (6 NYCRR 617.5(c)(20)), or "adoption of regulations, policies, procedures and local legislative decisions in connection with any action on this [Type II] list." 6 NYCRR 617.5(c)(27). Plainly, the E-waste Rules relate to a "new program," and also significantly enhance the requirements of the E-waste Law by, among other things, (i) establishing a "large" CEE threshold, (ii) requiring Direct Collection with respect to "large" CEE, and (iii) mandating every manufacturer seeking to exclusively provide drop-off service for "small" CEE provide at least 59 such drop-off locations.

Moreover, as explained by Professor Williams in his supporting declaration, DSNY failed to consider (i) additional truck traffic and traffic congestion caused by hundreds of manufacturers complying with DSNY's Direct Collection requirement for CEE exceeding DSNY's arbitrarily chosen 15-pound weight limit; (ii) the resulting additional noise and local air quality impacts or increased greenhouse gas emissions; and (iii) other reasonable and less environmentally harmful alternatives that could achieve the same or similar goals. Williams Decl. ¶ 20; CERC Decl. ¶¶ 14. DSNY failed to undertake several critical steps when it sought to adopt rules to implement a new program, including (i) the preparation and issuance of an environmental impact statement ("EIS") for public review and comment, and (ii) the issuance of findings based upon the EIS and public comments. DSNY also failed to comply with SEQRA's express notice and publication requirements. *See* Murphy Decl., Ex. 1, ¶¶ 84-104, 184-94.

(Continued …)
contain the specific "convenient" requirements DSNY subsequently incorporated into the E-waste Rules, such as the 15-pound threshold or the Direct Collection requirements. At the time the DSNY promulgated these regulations, it was under an independent obligation to undertake its own environmental review of the new mandates it was proposing for the E-waste Rules.

E. The E-Waste Rules and Program are Arbitrary and Capricious and an Abuse of the City's Police Powers

Under Article 78 of the CPLR, an affected party may challenge an administrative agency's quasi-legislative acts such as rule-makings and regulation if those quasi-legislative acts "[were] made in violation of lawful procedure, [were] affected by an error of law or [were] arbitrary and capricious or an abuse of discretion." N.Y. C.P.L.R. 7803; *New York City Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194 (1994) ("[A]n administrative regulation will only be upheld if it has a rational basis, and is not unreasonable, arbitrary or capricious.").

Here, DSNY acted arbitrarily and capriciously when, unsupported by empirical facts, it promulgated E-waste Rules lacking any rational nexus with the goals intended by the City Council. There is no support for the 15-pound threshold for "large" CEE, *see* Murphy Decl., Ex. 13, and the Direct Collection mandate directly conflicts with the City Council's goal of "environmentally sound collection of electronic waste." Local Law No. 13 § 1. Indeed, counsel to the Sanitation Committee of the City Council testified that DSNY's draft rule requiring direct home collection of E-waste was not what the City Council intended. *See* Murphy Decl., Ex. 7. Moreover, DSNY makes an arbitrary and unsupported distinction between CEE on one hand and other electronic bulk and special wastes on the other. *See supra,* at 18-19.

The limits on the City's police powers provide that a local government may not enact a law that "impair[s] the power of any other local government." N.Y. Const. art. IX, § 2(d); *see* N.Y. Municipal Home Rule, art. 2, § 10.1(ii)(a)(12) (a local government may only enact laws that relate to the "government protection, order, conduct, safety, health and well-being of persons or property *therein*.") (emphasis added); *Whitestone Bridge Drive-In Theatre, Inc. v. O'Connell*, 217 N.Y.S.2d 371 (1st Dep't 1961). NYC's Program is an unlawful extraterritorial exercise of its police power by regulating manufacturers and manufacturers' activities outside the City's borders. For example, it mandates recycling performance standards and other activities of out-of-city manufacturers. 16 RCNY § 17-03(h)(6) (requiring information concerning end markets and recyclers to be utilized and certifying that collection and recycling activities comply with all local, state, federal and international

laws). The City cannot dictate the recycling program for the world's electronics industry nor can it regulate what a manufacturer ultimately does with CEE after it leaves the City's limits. *See Whitestone Bridge,* 217 N.Y.S.2d at 371.

CONCLUSION

Plaintiffs agree with Defendant Bloomberg that the City's E-Waste Program is unconstitutional and the E-Waste Rules compound the illegal and extraterritorial burdens on Plaintiffs. Plaintiffs are likely to succeed on one or more of their claims and the damages caused by the Program and Rules are irreparable. Plaintiffs respectfully request a preliminary injunction until summary judgment issues or a trial is held, and granting such other further relief as this Court deems just and proper.

Dated: August 7, 2009
New York, New York

Respectfully submitted,
BEVERIDGE & DIAMOND, P.C.

By: /s/ Michael G. Murphy

Michael G. Murphy (MM 5472)
Megan R. Brillault (MB 5562)
477 Madison Avenue, 15th Floor
New York, NY 10022
Telephone: (212) 702-5400
Facsimile: (212) 702-5450
mmurphy@bdlaw.com
mbrillault@bdlaw.com

James B. Slaughter (admitted *pro hac vice*)
Nadira Clarke (admitted *pro hac vice*)
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
Telephone: (202) 789-6000
Facsimile: (202) 789-6190
jslaughter@bdlaw.com
nclarke@bdlaw.com

Attorneys for Plaintiffs Consumer Electronics Association, Information Technology Industry Council, and ITAC Systems, Inc.

APPENDIX

KRAFT FOODS NORTH AMERICA, INC., Plaintiff, -against- ROCKLAND COUNTY DEPARTMENT OF WEIGHTS AND MEASURES and JAMES FARKAS, in his official capacity as Director of Rockland County Department of Weights and Measures Office of Consumer Protection, Defendants.

01 Civ. 6980 (WHP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2003 U.S. Dist. LEXIS 2714

February 26, 2003, Decided
February 26, 2003, Filed

DISPOSITION: [*1] Defendant Rockland County's motion for summary judgment granted in part and denied in part, and plaintiff's motion for summary judgment granted in part and denied in part. Parties' requests for attorneys' fees denied.

COUNSEL: Jonathan L. Abram, Esq., Lyndon M. Tretter, Esq., Hogan & Hartson LLP, New York, NY, for plaintiff.

Patrick Carle, Esq., County of Rockland, New City, New York, for defendants.

JUDGES: WILLIAM H. PAULEY III, U.S.D.J.

OPINION BY: WILLIAM H. PAULEY

OPINION

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

Kraft Foods North America, Inc. ("Kraft") seeks declaratory and injunctive relief requiring defendants Rockland County Department of Weights and Measures and its Director, James Farkas (collectively, "Rockland County") to conduct their inspection practices in accord with federal laws governing labels on packaged foods shipped in interstate commerce. More specifically, Kraft alleges that Rockland County conducts food packaging inspections at retail stores in Rockland County in a manner which: (1) differs impermissibly from federal food labeling laws that expressly preempt conflicting state and local standards; (2) interferes with interstate commerce; and (3) violates [*2] the Due Process Clause of the United States Constitution.

Presently before this Court are dueling motions: Rockland County's "Motion to Dismiss or in the Alternative for Summary Judgment," ("R.C. Br.") and Kraft's "Cross-Motion for Summary Judgment" ("Kr. Opp.").

As a preliminary matter, Rockland County styles its motion as one for summary judgment. In determining whether to convert a *Rule 12(b)(6)* motion into one for summary judgment *sua sponte,* "the essential inquiry is whether [plaintiff] should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or [was] taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings." *In re G. & A. Books, Inc., 770 F.2d 288, 295 (2d Cir. 1985)*; see also *Kennedy v. Empire Blue Cross & Blue Shield, 989 F.2d 588, 592 (2d Cir. 1993)* (holding that there was no error in *sua sponte* conversion,

and plaintiffs were not unfairly surprised, where defendant's motion papers sought dismissal on certain grounds, summary judgment was granted on those grounds, and plaintiffs had supplemented the record with exhibits). Rather than [*3] assert that Kraft's complaint is deficient, Rockland County instead argues that the substantive allegations of the Complaint lack merit. Moreover, Rockland County included discovery materials dehors the complaint to a declaration submitted in opposition to Kraft's summary judgment motion and in reply on its own motion ("R.C. Opp. and Reply").(Carle Decl. P 3, Ex. 1.)

Moreover, the parties completed discovery and the facts are not in dispute. They entered into a joint stipulation pursuant to *Fed. R. Civ. P. Rule 26(f)* ("Joint Stip."). Further, Rockland County did not respond to Kraft's Rule 56.1 statement. See Local Rule 56.1(b). Kraft's Rule 56.1 statement complies with *Rule 56(e) of the Federal Rules of Civil Procedure* as each statement of material fact is supported by citation to admissible evidence. Thus, pursuant to Local Rule 56.1(c), the Court accepts Kraft's Rule 56.1 statement as undisputed. See *Holtz v. Rockefeller & Co., 258 F.3d 62, 72 (2d Cir. 2001).*

A determination that Rockland County's motion is one seeking summary judgment does not take Rockland County by surprise. Not only did its submission closely resemble one for summary judgment as opposed [*4] to a motion to dismiss, but Rockland County also supplemented the record with exhibits. Thus, Rockland County knew, or reasonably should have known, of the possibility that the motion would be construed as one for summary judgment. See *Kennedy, 989 F.2d at 592.* Accordingly, pursuant to *Rule 12(b) of the Federal Rules of Civil Procedure*, the Court will treat Rockland County's submission as one for summary judgment. As Kraft filed a "cross-motion" for summary judgment, both parties were afforded a reasonable opportunity to present material pertinent to Rockland County's motion for summary judgment. See *Fed. R. Civ. P. Rule 12(b).*

For the reasons stated below, Rockland County's motion for summary judgment is granted in part and denied in part, and Kraft's motion for summary judgment is granted in part and denied in part.

BACKGROUND

The undisputed facts are summarized as follows:

A. Rockland County's Inspection Practices

Rockland County inspectors conduct net weight inspections of food products at individual retail stores within Rockland County, where they select one or two packages of a product from a retail shelf and weigh them. (Joint Stip. P 4.) Through [*5] its inspection practices, Rockland County requires packaged food products sold in the county to equal or exceed the net weight stated on the package label. (Pl.'s 56.1 Stmt. P 5; Farkas Dep. at 20.) If the packages selected equal or exceed the labeled weight, the inspector returns the items to the shelf. (Joint Stip. P 4.) The inspector also records the weight results in a "commodity report," and makes no further use of them. (Joint Stip. P 4.)

However, if the packages tested weigh less than the labeled weight, every package of that item on the shelf ("the inspection lot") is subject to "on-site sampling." (Joint Stip. P 4.) The "on-site sampling" protocol requires the inspector to weigh twelve packages or all packages on the shelf if there are fewer than twelve. (Joint Stip. P 4.) Armed with those results, the inspector performs a mathematical calculation. If the resulting average weight of the sampled packages is below the label weight, the entire inspection lot is deemed misbranded and ordered "off sale," and a civil penalty is imposed on the retail store. Conversely, if the resulting average weight exceeds or is equal to the label weight, the data is recorded in a "commodity report, [*6] " and the inspection is concluded. (Joint Stip. P 4.)

Rockland County issues citations only to retail stores. (Joint Stip. P 5.) The county has no procedure for notifying a packaged food product manufacturer, like Kraft, before issuing a citation. (Joint Stip. P 5.) Moreover, Rockland County cites retailers without considering any production data from the manufacturer. (Joint Stip. P 5; Pl.'s 56.*1 P 12*; Farkas Dep. at 33.) While not fined directly, Kraft bears the financial cost because retailers pass on the fine and any other expenses associated with pulling Kraft's product from the shelves, including a "business interruption fee." (Pl.'s 56.1 Stmt. P 17; Spence Decl. P 12.)

During 2000 and 2001, Rockland County issued at least fifteen net weight citations against retailers for underweight Kraft products such as Oscar Meyer Beef Bologna and Oscar Meyer Cheese Dogs. (Spence Decl. P 8, Ex. 1.) Each citation alleges that Kraft products were labeled improperly because they were underweight.

(Spence Decl. Ex. 1.) Rockland County issued each citation based on the testing protocol set forth above. (Pl.'s 56.1 Stmt. P 13; Spence Decl. P 12.) In those instances where the manufacturing [*7] plant code information could be ascertained from the citation, Kraft's records reveal that the average weight of those production runs was at or above the weight stated on the package label. (Pl.'s 56.1 Stmt. P 14; Spence Decl. PP 9-10.)

B. Kraft's Food Packaging Procedures

Kraft manufactures food products in production runs that last approximately six to eight hours and produce a stream of tens of thousands of individual food packages. (Joint Stip. P 1.) Because of inherent variations in the manufacturing process, individual food packages in any production run fluctuate from slightly above the labeled weight to slightly below the labeled weight. (Joint Stip. P 2.) Graphically, Kraft's production data depicts this variation in undulating waves throughout the course of an entire run. (Joint Stip. P 2; Snee Decl. P 7, Ex. 3.)

Before a production run, Kraft employees select a per package weight above the labeled net weight to serve as the target weight for that production run. The target weight is chosen on the basis of the expected variation in net weight common to that product and manufacturing machinery. (Pl.'s 56*.1 P 7*; Spence Decl. P 5.) Throughout each run, Kraft [*8] monitors the average net weight of food packages to ensure compliance with applicable federal laws and guidelines. (Pl.'s 56*.1 P 8*; Spence Decl. P 6.) Kraft boxes individual food packages into cartons as they come off the production line. With most products, each retail carton contains a dozen food packages that come off the line in consecutive order in less than a minute. (Joint Stip. P 3.) Thus, while some packages at a single retail location may all be "underweight," packages sold at another retail store may all exceed the labeled net weight. (Snee Decl. P 8; Farkas Dep. at 39-40.)

Kraft policy requires packages from each production run to be sampled statistically to ensure compliance with federal laws and guidelines. In general, these samples comprise at least fifty and sometimes over one hundred packages, drawn three to five at a time at least every 30 minutes throughout a production run. (Pl.'s 56.1 Stmt. P 9; Spence Decl. P 6.) At the end of the run, those samples are averaged to yield an average weight for the entire lot. If that sampled average weight is below the labeled package weight, Kraft does not distribute the product to retailers. (Pl.'s 56.1 Stmt. P [*9] 10; Spence Decl. P 7.)

Kraft advances three claims. First, Kraft alleges that Rockland County's net weight inspection practices violate the *Supremacy Clause of the United States Constitution* because they impermissibly differ from federal net weight labeling laws. (Compl. PP 43-46.) Second, Kraft alleges that those same inspection practices impose a negative effect on interstate commerce and thus violate the *Commerce Clause of the United States Constitution*. (Compl. PP 47-49.) Finally, Kraft contends that Rockland County violates the Due Process Clause of the United States Constitution by notifying and providing a hearing only to retailers, not manufacturers such as Kraft, when it issues a citation for underweight food packages. (Compl. PP 50-53.)

DISCUSSION

I. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; accord [*10] *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. The burden of demonstrating the absence of any genuine dispute as to a material fact rests with the moving party. See, e.g., *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*; *Grady v. Affiliated Cent., Inc., 130 F.3d 553, 559 (2d Cir. 1997)*. In evaluating the record to determine whether there is a genuine issue as to any material fact, the "evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor." *Liberty Lobby, 477 U.S. at 255*.

II. The Preemption Claim

Kraft alleges that federal law expressly preempts Rockland County's inspection practices because such practices differ from federal net weight labeling requirements. Rockland County argues that the county's net weight inspection practices are not preempted by federal law and are valid under the *Supremacy Clause of*

the United States Constitution. U.S. Const. VI, cl. 2.

Kraft asserts [*11] that, through four federal statutes, "Congress has specifically mandated that state and local governments may not impose food package label requirements that are in conflict with, are not identical to, are different from or are in addition to those imposed by federal law." (Comp. P 12.) Those four statutes governing net weight labeling requirements for food are: (i) the Federal Food, Drug, and Cosmetic Act ("FDCA"), *21 U.S.C. §§ 331(a)*, *343(e) (2003)*; (ii) the Federal Meat Inspection Act ("FMIA"), *21 U.S.C. §§ 607(b)*, *601(n)(5)(2003)*; (iii) the Poultry Products Inspection Act ("PPIA"), *21 U.S.C. §§ 458(a)(2)*, *453(h)(5) (2003)*; and *(iv)* the Fair Packaging Labeling Act ("FPLA"), *15 U.S.C. § 1453 (2003)* (collectively, the "Federal Food Packaging Statutes"). Kraft specifically contends that Rockland County's inspection procedures, as implemented, conflict with the mandates of federal laws regulating food labeling by effectively imposing a minimum weight standard where federal law expressly permits reasonable weight variations in packaged foods. (Comp. PP 3-5, 11-28, 43-46.)

A. Doctrine of Preemption

[*12] The doctrine of preemption is based upon the *Supremacy Clause*, which "invalidates state laws that 'interfere with or are contrary to,' federal law." *Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 712, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985)* (quoting *Gibbons v. Ogden, 22 U.S. 1, 9, 6 L. Ed. 23* Wheat (1824)). A federal statute or regulation may supersede a state law or regulation through either express or implied preemption. See *Hillsborough County, 471 U.S. at 713* (stating that analysis of local ordinances under *Supremacy Clause* is also identical to that of state laws) (citations omitted); *Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 415 (2d Cir. 2002)*. "Express preemption occurs to the extent that a federal statute expressly directs that state law be ousted to some degree from a certain field." *Sprint Spectrum L.P., 283 F.3d at 415* (citing *Jones v. Rath Packing Co., 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977))*.

Absent express preemption, a state regulation may be implicitly preempted through either field preemption or conflict preemption. *Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98, 120 L. Ed. 2d 73, 112 S. Ct. 2374 (1992)*. [*13] Field preemption occurs "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)* (citations omitted); *Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 320 (2d Cir. 2000)*. Conflict preemption occurs either "where it is impossible for a private party to comply with both state and federal requirements," *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963)*, or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995)*.

In analyzing a state regulation, the Court must "consider [the] relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co., 430 U.S. 519, 526, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977)*. Further, preemption is [*14] not to be lightly presumed. *California Federal Savings & Loan Assoc. v. Guerra, 479 U.S. 272, 281, 93 L. Ed. 2d 613, 107 S. Ct. 683(1987)*.

B. Rockland County's Inspection Practices

The Federal Food Packaging Statutes each contain a provision that explicitly preempts differing state regulations. See *21 U.S.C. § 343-1(a)(2) (2003)* (FDCA preemption); *21 U.S.C. § 678 (2003)* (FMIA preemption); *21 U.S.C. § 467e (2003)* (PPIA preemption); *15 U.S.C. § 1461 (2003)* (FPLA preemption). The FDCA provides in pertinent part: "no State or political subdivision of a State may directly or indirectly establish ... any requirement for the labeling of food of the type required by *section 343(c)*, *343(e)* or *343(i)(2)* of this title that is not identical to the requirement of such section." *21 U.S.C. § 343-1(a)(2) (2003)*. The FPLA states that

> it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package [*15] of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of *section 1453* of this title

> or regulations promulgated pursuant thereto.

15 U.S.C. § 1461 (2003).

The FMIA provides that "marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to [articles subject to the FMIA]." *21 U.S.C. § 678 (2003).* The FMIA also allows for concurrent state jurisdiction to enforce its requirements. See *21 U.S.C. § 678.* However, such concurrent jurisdiction does not allow states to enact their own additional requirements. *Nat'l Broiler Council v. Voss, 44 F.3d 740, 746 (9th Cir. 1994).* The PPIA contains preemption and concurrent jurisdiction language nearly identical to that in the FMIA. See *21 U.S.C. § 467e (2003).*

The Federal Food Packaging Statutes or the regulations promulgated thereunder all state that "reasonable variations caused by loss or [*16] gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practices will be recognized." See, e.g., *21 U.S.C. § 343(e)*(FDCA); *21 C.F.R. § 101.105(q)* (FDCA and FPLA); *9 C.F.R. § 317.2 (h)(2)* (FMIA); *9 C.F.R. § 381.121(c)(6)* (PPIA). The Supreme Court has held that the FDCA's weight variation regulations apply to the FPLA. See *Jones v. Rath Packing Co., 430 U.S. 519, 534, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977).*

The USDA enforces the FMIA and PPIA, while the FDA enforces the FDCA and FPLA. See *Grocery Manuf. of Am., Inc. v. Gerace, 755 F.2d 993, 997 (2d Cir. 1985).* The USDA's Food Safety and Inspection Service ("FSIS"), and the National Institute of Standards and Technology regulate the testing of meat and poultry packages for compliance with the food packaging and labeling standards set forth in the Federal Food Packaging Statutes. See National Institute of Standards and Technology, Handbook 133 Checking the Net Contents of Packaged Goods (the "Handbook"), § 1.1 (4th ed. 2002); [*17] Food Safety Inspection Service, U.S. Dep't of Agriculture, Training Module on Net Weights, ("FSIS Training Module on Net Weights") 3 (Dec. 7, 1999) (stating the FSIS uses net weight compliance procedures contained in the Handbook); see also Office of Regulatory Affairs, Food & Drug Admin., Compliance Policy Guides, Ch. 5, 557.250 (2d ed. 1995) (requiring FDA officials to review plant data when making dairy-related enforcement decisions if testing reveals products to be underweight by less than two percent). The FSIS net weight enforcement practices state that "when packers produce standard weight packages or containers, they target the average fill of these packages or containers to equal or exceed the predetermined weight declared on the label." FSIS Training Module on Net Weights at 4. The USDA also advises food manufacturers to maintain records of net weight and tare measurements of production lots "in order to controvert a potential finding made outside of the plant." . Moreover, the USDA notes that:

> The [plant] data on specific lots may well substantiate compliance with net weight requirements. [*18] On the other hand, if no such data exists, then the State or local weights and measures authority as well as Federal authorities could take appropriate regulatory enforcement action.

55 Fed. Reg. 49826, 49830. Thus, federal regulations direct manufacturers to aim to have the average weight of the packages of a production lot equal the weight stated on the label. Implicitly, these regulations acknowledge that some packages may contain less than the weight stated on the label.

The Handbook states that "an effective testing program" will test at the point of pack, at the wholesale and retail levels. Handbook § 1.1. It adds:

> Generally, retail package testing is not conducive to checking large quantities of individual products of any single production lot. Therefore, at the very least, follow-up inspections of a particular brand or lot code number at a number of retail and wholesale outlets, and ultimately at the point of pack, are extremely important aspects in any package-checking scheme.

Handbook, § 1.1. With respect to packaging requirements, the Handbook notes "the net quantity of content statement must be 'accurate,' but reasonable [*19] variations are permitted .... The limits for acceptable variation are based on current good manufacturing practices in the weighing, measuring, and packaging

process." Handbook, § 1.2. Finally, the Handbook states that "plus or minus variations from the declared net weight ... are permitted when they are caused by unavoidable variations in weighing ... the contents of individual packages that occur in current good manufacturing practice." Handbook § 1.2.

Rockland County conducts its inspections to enforce *New York Agriculture and Markets Law § 194*, which prohibits retailers from offering for sale falsely labeled packages. *N.Y. Agriculture and Markets Law § 194* (McKinney's 2002). Rockland County's method of enforcing New York's state food labeling regulations is preempted by the Federal Food Packaging Statutes. In practice, Rockland County's inspectors impose a standard that is "different from" that required under federal law because their inspection practices: (1) fail to permit "reasonable variations" in package weight based on current good manufacturing practices in the weighing, measuring and packaging process; and (2) take into account package weight solely at [*20] the retail level.

Rockland County effectively imposes a minimum weight requirement by failing to allow for "reasonable variation" in the weight of food packages in relation to the net weight statement on the label. In other words, requiring an inspection lot of approximately twelve items to have, at a minimum, the weight stated on the package does not allow for reasonable variations below the stated package weight, as mandated under the Federal Food Packaging Regulations.

Additionally, measuring packages solely at the retail level does not comply with the federal inspection practice of also testing at the point of pack and at wholesale sites. Handbook § 1.1. Specifically, the Handbook states that retail, small-lot inspections at a retail store are "not conducive to checking large quantities of individual products of any single production lot. Therefore, at the very least, follow-up inspections of a particular brand or lot code number at a number of retail and wholesale outlets, and ultimately the point of pack, are extremely important aspects in any package-checking scheme." Handbook § 1.1. Rockland County does not conduct follow-up inspections at any other retail outlet [*21] or at wholesale centers. Nor does Rockland County consider the weight at the point of pack, which is information readily available from Kraft. (Joint Stip. P 5; Pl.'s 56.1 Stmt. P 15; Spence Decl. P 10.) Moreover, a carton of twelve packages represents a fraction of a minute of a six to eight hour production run during which time the net weight of packaged food fluctuates in undulating waves. (Joint Stip. PP 1, 2.)

Rockland County's method of using a single store sample conflicts with USDA practices enunciated in the Handbook and statistically fails to account for fluctuations in package weight during the manufacturing process. Handbook § 1.1; (Snee Decl. P 5.) By considering only limited information gleaned from retail inspections, Rockland County effectively ignores the Federal Food Packaging Statutes which permit variations across the production lot. Cf. *Jones, 430 U.S. at 532 n. 19* (stating that states may use valid statistical sampling techniques to police compliance with federal and state labeling laws) (emphasis added).

In an analogous case, the Supreme Court compared California and federal standards concerning accuracy for net weight labeling. [*22] *Jones v. Rath Packing Co., 430 U.S. 519, 528-32, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977).* In effect, California's inspection sampling practices implicitly allowed slight variations due to the manufacturing process, but did not allow for weight loss resulting from moisture loss during distribution. *Jones, 430 U.S. at 531*. This practice conflicted with the USDA's interpretation of the FMIA to permit variations due to moisture loss, and accordingly the Court held that the FMIA explicitly preempted the California regulations. *Jones, 430 U.S. at 529, 532*. Like the California regulations in Jones, Rockland County's method of enforcing the New York Agriculture and Markets law is preempted by the Federal Food Packaging Statutes because its inspection practices and policies do not allow for reasonable variations from the label's net weight statement based on current good manufacturing practices in the weighing, measuring and packing process.

Accordingly, Rockland County's net weight inspection practices impermissibly "differ from" and are "contrary to" the Federal Food Packaging Statutes and are therefore preempted by such federal laws. See [*23] *Jones, 430 U.S. at 531-32* (finding state labeling law requiring accurate net weight expressly preempted where it differed from federal labeling law allowing variations); *Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 712, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985)* (*Supremacy Clause* "invalidates state laws that 'interfere with or are contrary to' federal law") (quoting *Gibbons v. Ogden, 22 U.S. 1, 9, 6 L. Ed. 23* Wheat

(1824)); see also *Grocery Manuf. of Am., Inc. v. Gerace, 755 F.2d 993, 1002-03 (2d Cir. 1985)* (New York labeling regulation regarding lettering size preempted by the FMIA and PPIA); *Nat'l Broiler Council v. Voss, 44 F.3d 740, 746 (9th Cir. 1994)* (finding preemption under FMIA and noting that states may enforce the federal labeling laws, but that the USDA did not grant states authority to enact their own, additional requirements); *Cook Family Foods, Ltd. v. Voss, 781 F. Supp. 1458, 1465-68 (C.D. Cal. 1991)* (state law preempted by FMIA where state field inspectors used different, subjective procedures to test net weight of packaged goods); *Northwestern Selecta, Inc. v. Munoz, 106 F. Supp. 2d 223, 231 (D. P.R. 2000)* [*24] (Puerto Rico Department of Agriculture regulation preempted where it differed from the PPIA).

Therefore, Kraft's motion for summary judgment on its preemption claim is granted and correspondingly Rockland County's motion for summary judgment on that claim is denied.

III. The Interstate Commerce Claim

In Count II of its Complaint, Kraft alleges that Rockland County's inspection practices have a disparate effect on interstate commerce and unreasonably and unduly burden interstate commerce. (Comp. PP 40-42, 47-49.) Specifically, Kraft alleges that defendants' net weight label enforcement practices create "substantial burdens that are not outweighed by any local interest sufficient to justify the burden on Kraft." (Comp. P 41.) Kraft additionally avers that in order to comply with Rockland County's net weight labeling requirements, it would be forced to alter its nationwide packing system which already meets federal requirements, and instead create a special packing system solely for products distributed in Rockland County. (Comp. PP 40-42; Kr. Opp. at 21.) In contrast, Rockland County contends that its inspection practices are exempt from challenge under the *Commerce Clause*.

[*25] A. *Commerce Clause*

The *Commerce Clause of the United States Constitution*, *Const. Art. 1 § 8 cl. 3*, authorizes Congress "to regulate commerce ... among the several states," and, in its negative context, the Dormant *Commerce Clause* limits the regulatory authority of states. See *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245, 253 (2d Cir. 2001).* Notwithstanding that limiting power, Congress did not intend to preclude states from regulating matters related to the health, life and safety of their citizens. *Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 428, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963).*

In analyzing whether local or state action violates the Dormant *Commerce Clause*, the Court must initially determine whether the state or local ordinance "regulates even-handedly with only incidental effects on interstate commerce or discriminates against interstate commerce either facially or in practical effect." *Automated Salvage v. Wheelabrator Envtl. Sys., 155 F.3d 59, 74* (quoting *Hughes v. Oklahoma, 441 U.S. 322, 336, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979)).* Discrimination against interstate [*26] commerce exists where there is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys. v. Department of Envtl. Quality, 511 U.S. 93, 99, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994).*

Nondiscriminatory regulations regulate evenhandedly with only incidental effects on interstate commerce. *Peake Excavating Inc. v. Town Board of the Town of Hancock, 93 F.3d 68, 74 (2d Cir. 1996).* "Nondiscriminatory regulations that have only incidental effect on interstate commerce are valid 'unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Automated Salvage, 155 F.3d at 74* (quoting *Pike v. Bruce Church, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970))*; see *Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981).* The Second Circuit defines "incidental effect" as "the burdens on interstate commerce that exceed the burdens on intrastate commerce .... The fact that [the regulation] may otherwise affect commerce is not sufficient. [*27] " *Automated Salvage, 155 F.3d at 74*, (citing *USA Recycling v. Town of Babylon, 66 F.3d 1272, 1287 (2d Cir.1995)).* Accordingly, the minimum showing required to succeed in a Dormant *Commerce Clause* challenge to a state regulation is that the regulation has a disparate impact on interstate commerce. See id.

Thus, where a state statute or regulation is nondiscriminatory and has a disparate impact on interstate commerce, the key inquiry is whether: (1) the state's interest is legitimate; and (2) the burden on interstate commerce clearly exceeds the putative local

benefits. *Wyoming v. Oklahoma, 502 U.S. 437, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992)*; .

B. Undue Burden

Kraft alleges that Rockland County's net weight labeling enforcement policies violate the Dormant *Commerce Clause* because such policies unduly burden interstate commerce. (Kr. Opp. at 20-21.) Kraft does not allege, nor could it, that Rockland County's policies are discriminatory, either facially or in effect. See *Oregon Waste Systems, 511 U.S. at 99*; *Grocery Mfrs. of Am., Inc. v. Gerace, 755 F.2d 993, 1003 (2d Cir. 1985)*. [*28] Accordingly, this Court will analyze Rockland County's net weight enforcement practices as nondiscriminatory.

Rockland County's nondiscriminatory enforcement practices have a disparate impact on interstate commerce, as such practices impose burdens on interstate commerce exceeding the burdens on intrastate commerce. See *Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 2003 U.S. App. LEXIS 2678*, No. 01-7806, 01-7813, 2003 WL 303038, at *7 (2d Cir. Feb. 13, 2003); *Automated Salvage, 155 F.3d at 74*. As a national manufacturer, Kraft packages and labels various food items in lots, which are then shipped across the United States. Rockland County requires packaged food items to have an accurate, not average, net weight in relation to the labeled weight, as federal law allows. (Pl.'s 56.1 Stmt. P 5; Farkas Dep. at 20.)By subjecting Kraft to a different, heightened standard than that which federal law mandates, Rockland County impedes Kraft's ability as a national manufacturer to package and sell goods in interstate commerce. In order to comply with Rockland County's minimum weight rule, a national manufacturer such as Kraft would have to specially segregate and separately label packages [*29] being distributed in Rockland County, as opposed to those distributed nationally. (Kr. Opp. at 21; See Pl.'s 56.1 Stmt. P 18; Snee Decl. P 5.) Manufacturers distributing packaged food solely within New York would not have to make such an onerous adjustment. Thus, Rockland County's regulation has an "incidental effect" on interstate commerce as the burden exceeds that on intrastate commerce.

Accordingly, in order to demonstrate that its regulations do not offend the *Commerce Clause*, Rockland County must establish that its inspection practices promote a "legitimate local public interest." *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)*; see also *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245, 256 (2d Cir. 2001)*. If Rockland County makes such a showing, its regulations will be upheld unless the burden on interstate commerce is clearly excessive in relation to the local benefit. *Pike, 397 U.S. at 142*.

Rockland County asserts that its inspection practices promote the legitimate state interest of ensuring that the "federal standard is maintained throughout the [*30] distribution and retail process." (R.C. Br. at 9.) More specifically, Rockland County maintains that the local benefit accorded is "protecting consumers from mislabeled products and allowing consumers to make value comparisons." (R.C. Opp. and Reply at 8.) In practice, however, Rockland County's regulations have "a far different impact" than upholding the federal standards. *Pike, 397 U.S. at 144*. In practice, Rockland County imposes a minimum weight standard that is impermissibly different from the federal regulations that require an average weight standard. Thus, Rockland County fails to establish a legitimate state purpose. See, e.g., *Grocery Manuf. of Am., Inc., 755 F.2d at 1003* (stating that a finding that state regulations were preempted made "it unnecessary for us to determine whether [those] provisions are invalid under the *Commerce Clause* as well").

Even if Rockland County could show a legitimate state purpose in imposing such an impermissibly different standard, Rockland County's regulations unduly burden interstate commerce in relation to the putative local benefit. See *Pike, 397 U.S. at 142*; *Brown & Williamson Tobacco Corp., 320 F.3d 200, 2003 WL 303038*, [*31] at *7. As noted, for Kraft to comply with Rockland County's minimum weight rule it would have to "segregate and label differently those products being distributed in Rockland County from those products being distributed in the rest of the country." (Kr. Opp. at 21; Pl.'s 56.1 Stmt. P 18; Snee Decl. P 5.) Such a process, if possible, would be time consuming and costly to a national manufacturer whose packaging and labeling systems are designed to comply with federal laws. There is no doubt that Rockland County's inspection practices place a heavy burden on interstate commerce without equally weighty local benefits. Accordingly, Kraft's motion for summary judgment on its interstate commerce claim is granted, and Rockland County's motion for summary judgment on this claim is denied.

IV. The Procedural Due Process Claim

Kraft's third claim alleges that Rockland County's inspection practices violate procedural due process by failing to provide Kraft with adequate notice and opportunity to be heard prior to the deprivation of a property interest. (Comp. PP 51-52.) Namely, Kraft alleges that Rockland County is constitutionally required to timely notify Kraft when it issues a citation [*32] and fines the retailer who shelves an allegedly underweight product manufactured by Kraft. (Comp. PP 37-39, 51-53.)

A. Due Process Clause

The *Due Process Clause of the Fifth* and *Fourteenth Amendments to the United States Constitution* guarantee that neither the states nor the federal government may deprive a person of liberty or property without due process. U.S. Const. amend. V, XIV; *Weinstein v. Albright, 261 F.3d 127, 133 (2d Cir. 2001)*. Generally, procedural due process requires that "individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *U.S. v. James Daniel Good Real Property, 510 U.S. 43, 48, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993)*; see *Mathews v. Eldridge, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)*; *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950)*. In order to prevail in such an action, a plaintiff must: (1) "identify a property right," (2) "show that the [Government] has deprived him of that right," and (3) "show that the deprivation was effected without due process." [1] *Local 342, Long Island Pub. Serv. Employees v. Town Bd., 31 F.3d 1191, 1194 (2d Cir. 1994)* [*33] (quoting *Mehta v. Surles, 905 F.2d 595, 598 (2d Cir. 1990)* (per curiam)); *Irwin v. City of New York, 902 F. Supp. 442, 446-47 (S.D.N.Y. 1995)*.

1 To determine what type of due process is required, courts consider three additional factors: (1) the private interest affected by official action; (2) the risk of erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the burdens of an alternative procedural requirement. *Mathews, 424 U.S. at 335*.

B. Due Process Analysis

Kraft cannot show that Rockland County deprived it of a property interest. Kraft claims it has incurred and will continue to incur financial, business and reputational losses due to Rockland County's practice of providing notice of a citation and subsequent hearing to only the retailer it directly fines rather than to the third-party [*34] manufacturer of the product. (Comp. P 39; Pl.'s 56.1 Stmt. P 16; Spence Decl. P 12.) However, it is undisputed that Rockland County's citations and fines are issued directly to the retailer who shelves underweight items, and that retailer immediately receives notice of a hearing, stating where and when it may dispute the citation. (Comp. P 29; Joint Stip. Facts P 5.) Such notice satisfies due process. See *Chalfy v. Turoff, 804 F.2d 20, 22 (2d Cir. 1986)* (affirming finding of adequate notice where summons contained time and place of hearing to contest fine). The fact that the retailer may ultimately pass along this fine and charge a "business interruption fee" to Kraft is a separate transaction between two private, non-Governmental entities. (Comp. P 39.) Kraft offers no legal authority for its assertion that Rockland County is constitutionally required to provide notice to such a non-party. "The proper inquiry is whether the state acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice." *Weigner v. City of New York, 852 F.2d 646, 649 (2d Cir. 1988)* (citing *Mullane, 339 U.S. at 315* [*35]). Indeed, to fashion such a requirement would impermissibly extend the limits of procedural due process. Accordingly, Kraft's motion for summary judgment on its due process claim is denied and Rockland County's motion for summary judgment on this claim is granted.

V. CONCLUSION

Kraft's motion for summary judgment is granted on its preemption and interstate commerce claims. Rockland County's motion for summary judgment dismissing Kraft's procedural due process claim is granted. The parties' requests for attorneys' fees are denied.

Accordingly, Rockland County is permanently enjoined from conducting food packaging and labeling inspections that do not comply in practice with federal regulations, including, but not limited to, the requirement that it allow for reasonable variations in the net weight of packages based on current good manufacturing practices in the weighing, measuring and packaging process. The Clerk of the Court is directed to close this case.

Dated: February 26, 2003

New York, New York

SO ORDERED:

WILLIAM H. PAULEY III

U.S.D.J.

LEXSEE 2008 U.S. DIST. LEXIS 94021

METROPOLITAN TAXICAB BOARD OF TRADE; MIDTOWN OPERATING CORP.; SWEET IRENE TRANSPORTATION CO. INC.; OSSMAN ALI; and KEVIN HEALY, Plaintiffs, -against- CITY OF NEW YORK; MICHAEL R. BLOOMBERG, in his official capacity as Mayor of the City of New York; THE NEW YORK CITY TAXICAB & LIMOUSINE COMMISSION ("TLC"); MATTHEW W. DAUS, in his official Capacity as Commissioner, Chair, and Chief Executive Officer of the TLC; PETER SCHENKMAN, in his official capacity as Assistant Commissioner of the TLC for Safety & Emissions; and ANDREW SALKIN, in his official capacity as First Deputy Commissioner of the TLC, Defendants.

08 Civ. 7837 (PAC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2008 U.S. Dist. LEXIS 94021

October 31, 2008, Decided

COUNSEL: [*1] For Metropolitan Taxicab Board of Trade, Midtown Operating Corp., Sweet Irene Transportation Co. Inc., Ossman Ali, Kevin Healy, Plaintiffs: Elizabeth Sykes Saylor, Matthew D. Brinckerhoff, Richard D. Emery, LEAD ATTORNEYS, Emery Celli Brinckerhoff & Abady, LLP, New York, NY.

For City of New York, Defendant: Scott M. Pasternack, LEAD ATTORNEY, NYC Law Department, Brooklyn, NY; Ramin Pejan, New York City Law Depart., Office of the Corporation Counsel, Bronx, NY.

For Michael R. Bloomberg, in his official capacity as Mayor of the City of New York, The New York City Taxicab & Limousine Commission ("TLC"), Matthew W. Daus, in his official capacity as Commissioner, Chair, and Chief Executive Officer of the TLC, Peter Schenkman, in his official capacity as Assistant Commissioner of the TLC for Safety & Emissions, Andrew Salkin, in his official capacity as First Deputy Commissioner of TLC, Defendants: Ramin Pejan, New York City Law Depart., Office of the Corporation Counsel, Bronx, NY.

JUDGES: HONORABLE PAUL A. CROTTY, United States District Judge.

OPINION BY: PAUL A. CROTTY

OPINION

OPINION & ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

The Metropolitan Taxicab Board of Trade, Midtown Operating Corp., Sweet [*2] Irene Transportation Co., Inc., Ossman Ali, and Kevin Healy ("Plaintiffs") bring this action for a preliminary or permanent injunction pursuant to *Rule 65 of the Federal Rules of Civil Procedure*, and for summary judgment pursuant to *Rule 56(a)*. Plaintiffs argue that the New York City Taxicab & Limousine Commission's regulations requiring all new taxicabs to have a minimum 25 mile-per-gallon ("mpg")

city rating by October 1, 2008, and a minimum 30 mpg city rating by October 1, 2009, are preempted under federal laws reserving regulation of fuel economy and emissions standards to federal agencies. Plaintiffs claim that they will be irreparably harmed by this regulation because compliance will cause substantial costs which they cannot recover. The Court finds that Plaintiffs have standing to bring this action; that they will be irreparably harmed; and that Plaintiffs have demonstrated a likelihood of success on the issue of preemption. The City's counterarguments are unconvincing. Accordingly, Plaintiffs' motion for a preliminary injunction is GRANTED. As for Plaintiffs' motion for summary judgment, the Court will not rule on summary judgment at this time. As anticipated by the Court's [*3] September 15, 2008 Order, the defendants will have 30 days from the time of this decision to answer or otherwise move with respect to Plaintiffs' complaint. [1]

1 This case has been fast-tracked since Plaintiffs filed the complaint on September 8, 2008. The Court held a conference with the parties on September 11, 2008, and the City agreed to adjourn the effective date of the regulations from October 1, 2008, to November 1, 2008. The Court set an expedited briefing schedule and held oral arguments on October 17, 2008. The September 15, 2008 Order did not contemplate Plaintiffs' summary judgment motion. Consistent with the parties' agreement and the Court order, the Defendants should be accorded a fair opportunity to answer Plaintiffs' complaint and take whatever discovery is necessary before any further motion practice.

BACKGROUND

2

2 The facts in this section are derived from Plaintiff's complaint, the parties' statements of fact submitted pursuant to *Local Rule 56.1*, and supporting affidavits and exhibits, unless otherwise specified.

I. The Parties

The Plaintiffs in this action represent a full spectrum of the taxicab industry, from owner, to driver, to end user. 3 Plaintiff Metropolitan [*4] Taxicab Board of Trade ("MTBOT") is a 56-year-old trade association made up of yellow medallion taxi ("taxicab" or "taxi") fleets in New York City. MTBOT is the largest taxi fleet association in the United States, with 27 member fleets and more than 3,500 taxis. Plaintiff Midtown Operating Corp. ("Midtown") is a private yellow taxicab garage. Midtown leases taxis to more than 800 independent contractors on a double-shifted (24-hour) daily basis. Every car leased at Midtown is a Crown Victoria Long Wheel Base ("LWB"). Plaintiff Sweet Irene Transportation Co. Inc. is a private New York corporation that owns and leases taxis. Plaintiff Ossman Ali is a Bronx resident and a self-employed independent contractor who leases and drives taxis. Plaintiff Kevin Healy lives in Roslyn Heights, N.Y., and is a frequent taxi passenger.

3 Notably, taxi manufacturers are not among the plaintiffs here. Apparently they do not object to the TLC's regulations and, according to the City, they are eager to supply new vehicles that comply with the regulations. (*See* Declaration of Ramin Pejan ("Pejan Decl.") Ex. 10.)

Defendants are: the City of New York; the New York City Taxicab & Limousine Commission ("TLC"), [*5] which is an administrative agency of New York City whose purpose is to regulate the taxi and limousine industry; Mayor Michael Bloomberg, in his official capacity; Matthew Daus, in his capacity as Commissioner, Chair, and Chief Executive Officer of the TLC; Peter Schenkman, in his capacity as the Assistant Commissioner for Safety & Emissions of the TLC; and Andrew Salkin, in his capacity as TLC First Deputy Commissioner.

II. The TLC's 25/30 MPG Rules

The TLC was created in 1971 and is governed by *§§ 2300 et seq.* of the New York City Charter, as well as by local laws passed by the New York City Council. The TLC has nine Commissioners, all appointed by the Mayor, with the advice and consent of the City Council. N.Y. City Charter *§ 2301(a)*. The TLC regulates essentially all aspects of taxi operations and licensing. Beyond the stated function of developing and improving taxi and limousine service in New York City, *§ 2300* states that the "further purpose" of the commission is to "adopt and establish an overall public transportation policy governing taxi, coach, limousine, wheelchair accessible van services and commuter van services as it relates to the overall public transportation network [*6] of the city . . . ." *Id. § 2300*. Pursuant to the City's

Charter, the TLC's jurisdiction and powers include the "regulation and supervision of the business and industry of transportation of persons by licensed vehicles for hire in the city . . . ." *Id. § 2303(a)*. Under these regulatory and supervisory powers, the TLC may set "[r]equirements of standards of safety, and design, comfort, convenience, noise and air pollution control and efficiency in the operation of vehicles and auxiliary equipment." *Id. § 2303(b)(6)*.

On December 11, 2007, following a public hearing, the TLC adopted new rules affecting the minimum mileage-per-gallon requirements that all new taxicabs in New York City must meet by October 1, 2008, and October 1, 2009. The new rules state that all new taxicabs must be either wheelchair accessible or must have: "[A] minimum city rating of twenty-five (25) miles per gallon as labeled pursuant to *title 49, section 32908 of the United States Code* and regulations promulgated pursuant thereto . . ." by October 1, 2008; and "[A] minimum city rating of thirty (30) miles per gallon as labeled pursuant to *title 49, section 32908 of the United States Code* and regulations promulgated [*7] pursuant thereto . . ." by October 1, 2009. TLC Rule § 3.03(c)(10)-(11), 35 RCNY § 3-03(c)(10)-(11) ("25/30 Rules"). [4]

4 *49 U.S.C. § 32908* sets forth federal requirements for the labeling of fuel economy information on vehicles. *See § 32908(b)*.

The rules were published for public comment in the City Record on October 22, 2007, comments were made, and notice of the promulgation of the new rules was published in the City Record on December 18, 2007. Record notice listed the benefits of the 25/30 Rules as industry-wide gasoline savings and the resulting easing of pressure to increase taxi fares for the public. On May 8, 2008, the TLC held another public hearing on the rules.

While the 25/30 Rules do not state that the new taxis must have hybrid engines, the effect of the minimum mpg standard is that only cars with hybrid engines or clean diesel engines can meet the mileage standard requirement. Taxis have a mandatory retirement of three to five years, [5] so, as a result of the new rule, essentially all taxis in the City would be hybrids by 2012. By the end of November 2007, of the city's 13,000 taxis, approximately 700 were hybrids. [6] More than 90% of all taxis were Crown Victoria non-hybrid [*8] vehicles, which do not meet the mpg requirement under the TLC's 25/30 Rules.

5 If a taxi is double shifted and not driven by a long-term driver it must be retired after three years. If a taxi is not double shifted or is driven by a long-term driver it must be retired after five years. A taxi can receive a one- or two-year extension if it is a "clean air" taxi or operates using compressed natural gas. *See* TLC Rule § 3-02.

6 By mid-August 2008, the number of hybrid taxis was more than 1,000.

III. Hybrid History Among New York City Taxis

New York City contemplated incorporating hybrid vehicles into the City's taxi fleet in 2003. That year the City enacted a local law permitting the TLC to issue additional taxi licenses, provided that at least 9% of the licenses went to cars powered by compressed natural gas or hybrids. *See* N.Y. City Admin. Code *§ 19-532(b)*. Over the next two years the TLC conducted bids for alternative-fuel vehicle licenses, but failed to approve any vehicles for use as taxis because, according to the Plaintiffs, the vehicles did not meet the TLC requirements for interior room. (*See* Declaration of Elizabeth Saylor ("Saylor Decl.") Ex. A PP 46-51.) In 2005 the TLC adopted new [*9] specifications on interior volume, headroom, legroom, and other categories, which, according to Plaintiffs, allowed hybrid vehicles to meet TLC guidelines. (*Id.* P 52.) Starting in October 2005, the TLC began approving hybrid cars for use as taxis. The TLC currently approves 10 types of hybrid and clean diesel vehicles for taxi use.

On April 22, 2007, Mayor Bloomberg announced a broad environmental proposal called "PlaNYC 2030" that included "doubl[ing] the efficiency of new taxis by 2012," which "could result in the entire fleet being converted to more fuel-efficient vehicles within eight to 10 years." (*Id.* Ex. F.) One month later, on May 22, 2007, Mayor Bloomberg announced that the City planned to make the taxicab fleet fully hybrid by 2012. (*Id.* Ex E.) The phase-in plan for hybrid taxis includes: 1,000 hybrids by October 2008; 4,000 hybrids by October 2009; 7,000 by October 2010; 10,000 by October 2011; and a fully hybrid fleet by October 2012. (*Id.*) The TLC subsequently passed the 25/30 Rules.

IV. Plaintiffs' Claims and Procedural History

Plaintiffs filed their complaint on September 8, 2008. Plaintiffs claim that the 25/30 Rules are expressly and

impliedly preempted by two federal [*10] regulations: the Energy Policy and Conservation Act of 1975 ("EPCA"), *49 U.S.C. §§ 32901 et seq.*, and the Federal Clean Air Act ("CAA"), *42 U.S.C. §§ 7401 et seq.* Plaintiffs requested a preliminary or permanent injunction preventing the City from implementing the 25/30 Rules on October 1 or, alternatively, summary judgment on their preemption claim. [7] As indicated in footnote 1, the Defendants agreed to delay implementation of the 25/30 Rules until November 1, 2008, so that the parties and the Court would have sufficient time to brief and consider the matter. (*See* September 15, 2008 Order ("Sept. 15 Order") 2 Idaho 58, 3 P 1.)

7 Plaintiffs' complaint also alleges that the TLC 25/30 Rules violate *N.Y. C.P.L.R. Article 78*, but Plaintiffs have not moved for relief on this claim. Accordingly, the Court does not consider the issue.

DISCUSSION

I. Preliminary Injunction Standard

To obtain a preliminary injunction, the moving party must show that it is likely to suffer irreparable harm without the requested relief, as well as either: (1) a likelihood of success on the merits; or (2) "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping [*11] decidedly toward the party requesting the preliminary relief." *Citibank, N.A. v. Citytrust, 756 F. 2d 273, 275 (2d Cir. 1985)* (citing *Mamiya Co. v. Masel Supply Co. Corp., 719 F.2d 42, 45 (2d Cir. 1983))*. Where a party seeks to enjoin government action "taken in the public interest pursuant to a statutory or regulatory scheme, however, the moving party cannot resort to the 'fair ground for litigation' standard, but is required to demonstrate irreparable harm and a likelihood of success on the merits." *Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996)* (internal quotations omitted). Since the TLC is a government agency acting in the public interest, Plaintiffs must show a likelihood of success on the merits.

Irreparable harm "means injury for which a monetary award cannot be adequate compensation." *Jayaraj v. Scappini, 66 F.3d 36, 39 (2d Cir. 1995)* (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979))*. Additionally, the "[i]rreparable harm must be shown by the moving party to be imminent, not remote or speculative." *Reuters, Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990)*.

Plaintiffs argue that they satisfy the preliminary injunction [*12] standards: (1) they will suffer irreparable harm because they will incur financial damage under the 25/30 Rules and will be unable to recoup those damages through a claim under *42 U.S.C. § 1983*; and (2) they are likely to succeed on the merits because the 25/30 Rules are preempted by federal law, and the City does not fall within the scope of the applicable exemptions. The Court first examines Plaintiffs' standing to bring a claim under the *Supremacy Clause*, and then discusses Plaintiffs' claims on irreparable harm and likelihood of success on the merits.

II. Plaintiffs' Standing to Sue

While Defendants suggest [8] that Plaintiffs lack standing (*see* Oct. 17, 2008 Oral Argument Tr. ("Oral Arg. Tr.") 18:19-19:05; Defendants' Memorandum in Opposition ("Def. Mem.") 13 n.10), Plaintiffs clearly have standing.

8 This issue has not been fully briefed by the parties but was addressed in a footnote in Defendants' response brief and by Defendants at oral argument.

The *Supremacy Clause, U.S. Const. art. VI, cl. 2*, provides a plaintiff with a cause of action to seek injunctive relief from allegedly preempted state action. *See Shaw v. Delta Air Lines, 463 U.S. 85, 96 n.14, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)* ("A plaintiff who seeks [*13] injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the *Supremacy Clause of the Constitution*, must prevail, thus presents a federal question which the federal courts have jurisdiction under *28 U.S.C. § 1331* to resolve."); *see also Indep. Living Ctr. of S. Cal., Inc. v. Shewry, 543 F.3d 1047, 2008 WL 4224917, at *13 (9th Cir. 2008)* ("[N]one of the Court's seminal preemption cases casts any doubt on the presumptive availability of declaratory and injunctive relief under the *Supremacy Clause*; to the contrary, the Court has consistently assumed--without comment--that the *Supremacy Clause* provides a cause of action to enjoin implementation of allegedly unlawful state legislation.").

Defendants suggest that Plaintiffs do not satisfy

Article III standing requirements because Plaintiffs have not suffered an invasion of a legally protected interest. Under *Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*, the constitutional standing requirement has three elements:

> First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, [*14] and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal citations, quotation marks, and alterations omitted). Defendants argue that any legally protected interest under the EPCA and the CAA belongs exclusively to the automobile manufacturers, not at all to the Plaintiffs. But it would cause considerable mischief to recognize the City's argument that the absence of an objection by the auto manufacturers enables it to do whatever it wishes, regardless of the language of the EPCA and the CAA. *Lujan* itself points out that where a suit challenges the legality of government action, a plaintiff's ability to establish standing "depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the [*15] action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id. at 561-62*. Here, Plaintiffs, not auto manufacturers, are the subject of the 25/30 Rules, and they are the ones who will suffer injury by the imposition of the City's regulations. The Court finds that Plaintiffs have standing to bring this action.

III. Irreparable Harm and the Likelihood of Recovery Under *§ 1983*

Plaintiffs claim that they will suffer irreparable harm because they will incur financial damages under the 25/30 Rules. [9] Plaintiffs contend that the available hybrid vehicles are more expensive to purchase, maintain, and repair, as compared to the Crown Victoria LWB. (*See, e.g.*, Saylor Decl. Ex. A PP 120-29; Reply Declaration of Elizabeth Saylor ("Saylor Reply") Ex. EE, Ex. HH, Ex. MM; Reply Declaration of Ronald Sherman ("Sherman Reply") P 9.) These transactional costs are identifiable and readily calculable. Normally they would not be considered irreparable, if they were recoverable. Plaintiffs argue, however, that they have no private right of action and cannot recover their damages under *42 U.S.C. § 1983*.

> 9 Plaintiffs also claim that they will suffer irreparable [*16] physical damages from the 25/30 Rules because the TLC-approved hybrid taxis are untested and unsafe. The Court does not rule on that claim at this time.

Section 1983 does not create a private right of action. It provides a mechanism for recovery where the Constitution or relevant statute gives a citizen a right to an action. *See Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 108, 110 S. Ct. 444, 107 L. Ed. 2d 420* ("In all cases, the availability of the *§ 1983* remedy turns on whether the statute . . . creates obligations sufficiently specific and definite to be within the competence of the judiciary to enforce, is intended to benefit the putative plaintiff, and is not foreclosed by express provision or other specific evidence from the statute itself.") (internal citations and quotations omitted). Thus, a plaintiff with standing to sue for federal preemption under the *Supremacy Clause* does not necessarily also have a claim for damages under *§ 1983*. *See e.g., Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury, 445 F.3d 136, 149 (2d Cir. 2006)*; *Wachovia Bank, N.A., v. Burke, 414 F.3d 305, 321 (2d Cir. 2005)*. A plaintiff only has a damages claim under *§ 1983* when a federal statute creates rights enforceable by *§ 1983*. [*17] *Gonzaga Univ. v. Doe, 536 U.S. 273, 283-84, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)* ("[A] plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private *right* but also a private *remedy*.") (citation and internal quotations omitted) (emphasis in original); *De Los Santos Mora v. New York, 524 F.3d 183, 195 (2d Cir. 2008)* (citing *Gonzaga, 536 U.S. at 289 n.7*). Accordingly, "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit" under *§ 1983*. *Gonzaga, 536 U.S. at 286*.

The Court in *Loyal Tire & Auto Center, Inc. v. Town of Woodbury* explained the distinction between a private claim under the *Supremacy Clause* and a private remedy under *§ 1983*: while a tow truck operator could sue the town alleging that a local law was preempted by a federal transportation law, the operator could not bring *§ 1983* claims because the federal statute did not "expressly grant any rights to individual motor carriers." *445 F.3d 136, 150 (2d Cir. 2006)*. A claim under *§ 1983* is distinct from a claim under the *Supremacy Clause* because a *Supremacy Clause* claim "simply asserts that a federal [*18] statute has taken away local authority to regulate a certain activity." *Id. at 149* (citing *Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J., 817 F.2d 222, 225 (2d Cir. 1987))*.

Whether the relevant statute creates a right depends first on Congress' intent that the provision benefit the plaintiff. *Id.* Second, the plaintiff "must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence." *Id. at 150* (citing *Wachovia, 414 F.3d at 321-22*). Finally, the statute must clearly impose a binding obligation on the states. *Id.*

Applying those factors here, there is no indication that Congress intended the EPCA to benefit the individual vehicle owner or user. The focus of the EPCA is on regulating fuel economy standards across an entire fleet of manufacturer vehicle models. *See 49 U.S.C. § 32901(a)(6)*; *see also infra* Part IV(A). Nothing in the EPCA expressly grants rights to individual drivers or owners. The statute focuses on the regulated parties and does not put an emphasis on the individual. Thus, it is likely that a court would not permit Plaintiffs to recover their expected damages through a *§ 1983* [*19] claim.

Additionally, Defendants rejected the Plaintiffs' offer to withdraw the motion for an injunction if Defendants would stipulate to Plaintiffs' right to damages if the 25/30 Rules are implemented and then struck down. (*See* Defendants' Letter of October 17, 2008 ("Def. Oct. 17 Letter").) This suggests that the Defendants themselves do not believe that Plaintiffs have a viable damages claim.

Finally, Defendants argue that Plaintiffs cannot show irreparable harm because Plaintiffs delayed until the final moment to seek injunctive relief, even though Plaintiffs knew about the impending TLC regulations for months. Defendants argue that Plaintiffs created their own harm through their delay. While a plaintiff's failure to act promptly in seeking injunctive relief can "undercut[]" the sense of urgency and suggest that there is no irreparable injury, *see Citibank, 756 F.2d at 277*, that is not the proper analysis here. *Citibank, N.A. v. Citytrust* dealt with a trademark claim, where the harm was immediately apparent upon infringement of the trademark, so there was no excuse for the filing delay. *Id. at 276-77*. Courts will excuse a delay, however, where "the harm largely is prospective and [*20] will arise from a discrete future event." *Million Youth March, Inc. v. Safir, 18 F. Supp. 2d 334, 340 (S.D.N.Y. 1998)*. Here, the harm to the Plaintiffs is in the future, and the exact amount and timing of the harm is not clear. In these circumstances, Plaintiffs' delay in bringing this action for injunction does not suggest a lack of urgency or bar them from relief.

Plaintiffs have shown that they are likely to suffer irreparable harm from enforcement of the 25/30 Rules because they will incur costs to comply with the regulations which they cannot recover in an action pursuant to *42 U.S.C. § 1983*. The Court now turns to whether Plaintiffs have shown a likelihood of success on the merits.

IV. Likelihood of Success on the Merits

Plaintiffs argue that they are likely to succeed on the merits because the 25/30 Rules are preempted by federal law. Before conducting a preemption analysis, the Court notes that it does not consider the question of whether hybrid vehicles are safe for operation as taxicabs. It does not consider the affidavits or reports from Plaintiffs' engineer C. Bruce Gambardella or Defendants' rebuttal report from Ricardo Inc. (*See* Saylor Decl. Ex. B; Declaration of Ramin Pejan [*21] ("Pejan Decl.") Ex. 1.) Those matters are better suited to the Article 78 claim, which, as previously indicated, the Court does not consider. While Plaintiffs seem to place emphasis on the TLC's motivation for its actions up to and including the adoption of the fuel economy standards in December 2007, the Court does not rely upon or give any weight to those arguments. Instead, the Court focuses on the words of the TLC's regulation and analyzes whether the regulation, as written, is preempted by federal law.

The *Supremacy Clause, U.S. Const. art. VI, cl. 2*, "invalidates state laws that interfere with, or are contrary to, federal law." *Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)* (internal quotation omitted). "State

action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." *Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)* (internal citations omitted). Conflict preemption exists either when "compliance with both federal and state regulations is a physical [*22] impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)*, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*. There is a general presumption against preemption; thus, "a state's police powers are not displaced by federal law unless there is compelling evidence that this was the manifest aim of Congress." *Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 58 (2d Cir. 1988)*. In every preemption case, "the purpose of Congress is the ultimate touch-stone" in determining the scope of a preemption statute. *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)*.

Actions taken by a state or political subdivision may not be preempted in some circumstances where the state acts as a market participant, rather than as a market regulator. *See Bldg. & Constr. Trades Council v. Associated Builders and Contractors, Inc., 507 U.S. 218, 227, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993)* ("*Boston Harbor*") ("Our decisions in this area support the distinction between government as regulator and government as proprietor.") The Court in *Boston Harbor* described the distinction between [*23] when the state acts as a regulator and when the state acts as a participant. *Id. at 229* ("When the State acts as a regulator, it performs a role that is characteristically a governmental rather than a private role . . . These distinctions are far less significant when the State acts as a market participant with no interest in setting policy."). The market participant doctrine is an extension of a principle from the *Commerce Clause*, under which a state may favor its own citizens over others when the state is an active participant in the relevant market. *See e.g., Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976)*. The market participant doctrine has been extended to preemption jurisprudence most commonly in federal labor law actions, *see, e.g., Chamber of Commerce of the United States v. Brown, 128 S. Ct. 2408, 2415, 171 L. Ed. 2d 264 (2008)*; *Boston Harbor, 507 U.S. at 227*; *Healthcare Ass'n of New York State v. Pataki, 471 F.3d 87, 108-09 (2d Cir. 2006)*, but also in environmental regulation cases. *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1042 (9th Cir. 2007)*. A threshold question when applying the market participant doctrine is whether the regulation in [*24] question contains "'any express or implied indication by Congress' that the presumption embodied by the market participant doctrine should not apply to preemption under the [regulation in question]." *Id*. (quoting *Boston Harbor, 507 U.S. at 231*).

A. Preemption Under the EPCA

The goals of the EPCA are to improve motor vehicle efficiency and to "decrease dependence on foreign [oil] imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1182 (9th Cir. 2008)* (quoting S. Rep. No. 94-516 (1975) (Conf. Rep.), *as reprinted in* 1975 U.S.C.C.A.N. 1956, 1957); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 306 (D. Vt. 2007)*. Under the EPCA, the Department of Transportation ("DOT") is charged with establishing federal fuel economy standards on a fleet-wide basis. *See 49 U.S.C. §§ 32902(a)*, *32902(c)*. These average standards are known as "corporate average fuel economy" or "CAFE" standards. The CAFE standard is "a performance standard specifying a minimum level [*25] of average fuel economy applicable to a manufacturer in a model year." *Id. § 32901(a)(6)*.

The DOT has delegated the responsibility for setting fuel economy standards to the National Highway Traffic Safety Administration ("NHTSA"). *49 C.F.R. § 1.50(f)*. The NHTSA must weigh four factors when setting standards: "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." *49 U.S.C. § 32902(f)*. The NHTSA has interpreted "economic practicability" to include consideration of consumer choice, economic hardship for the auto industry, and vehicle safety. *Green Mountain, 508 F. Supp. 2d at 307*.

The EPCA also contains an express preemption clause:

> When an average fuel economy standard prescribed under this chapter . . . is in effect, a State or political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

49 U.S.C. § 32919(a). This language is quite clear in its direction: "Congress's undoubted intent was to make [*26] the setting of fuel economy standards exclusively a federal concern." *Green Mountain, 508 F. Supp. 2d at 354*. The preemption provision also contains an exemption, or a savings clause: "A State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use." *49 U.S.C. § 32919(c)*.

Plaintiffs argue that the TLC's 25/30 Rules are preempted by the express language of *§ 32919(a)* and also impliedly preempted because the rules interfere with the federal fuel economy program, thwarting Congress' intent that regulation of fuel economy standards occur at the national level. They also argue that the City is not exempted from preemption by the savings clause at *§ 32919(c)* because taxicabs in New York City are not vehicles for the City's "own use."

To determine whether the 25/30 Rules are expressly preempted by *§ 32919(a)* of the EPCA, the Court starts with the language of the statute. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985)*. The [*27] relevant question when looking at *§ 32919(a)* is whether the 25/30 Rules are "related to fuel economy standards." If so, the rules are expressly preempted unless the savings clause or another exception applies.

The EPCA defines "fuel economy" as "the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used . . . ." *49 U.S.C. § 32901(a)(11)*. The Supreme Court has defined the term "standards" in the context of CAA preemption as "that which 'is established by authority, custom, or general consent, as a model or example; criterion; test.'" *Engine Manufacturers Association v. South Coast Air Quality Management District, 541 U.S. 246, 252-53, 124 S. Ct. 1756, 158 L. Ed. 2d 529 (2004)* (quoting Webster's Second New International Dictionary 2455 (1945)). A fair reading of the 25/30 Rules leads to but one conclusion: the rules set standards that relate to an average number of miles that New York City taxicabs must travel per gallon of gasoline.

Any doubt about this conclusion is eliminated by the TLC regulations' express incorporation of fuel economy standards as defined in the EPCA. The 25/30 Rules require "a minimum city rating of twenty-five (25) miles per gallon as [*28] labeled *pursuant to title 49, section 32908 of the United States Code* . . ." by October 1, 2008, and "a minimum city rating of thirty (30) miles per gallon as labeled *pursuant to title 49, section 32908 of the United States Code* . . ." by October 1, 2009. TLC Rule § 3-02(c)(10)(i), (c)(11)(i) (emphasis added). The TLC's regulations set fuel economy standards for taxicabs; and they are "related to fuel economy standards or average fuel economy standards" as contemplated under the EPCA's preemption provision.

The Supreme Court's decision in *Engine Manufacturers Association v. South Coast Air Quality Management District, 541 U.S. 246, 124 S. Ct. 1756, 158 L. Ed. 2d 529 (2004)*, also forecloses any argument that the EPCA applies only to fuel economy standards as they relate to manufacturers or sellers. In that case, which involved preemption under the CAA, not the EPCA, the Supreme Court clarified that CAA preemption applies equally to local emission laws addressed to purchasers of vehicles, as opposed to only manufacturers, sellers, or dealers. South Coast Air Quality Management District ("South Coast") was a political subdivision of California responsible for air pollution control in the Los Angeles metropolitan area. South [*29] Coast adopted rules prohibiting various public and private fleet operators from purchasing or leasing vehicles not in compliance with stringent emission requirements. *Id. at 248-49* (rules governed operators of fleets of street sweepers, passenger cars, public transit vehicles, including shuttles and taxicabs picking up airline passengers, as well as other fleet operators). The Court, in an 8-1 decision, held that a state law that restricted emissions in new vehicles was preempted whether it targeted purchasers or manufacturers. *Id. at 253-55* (finding that the district court's interpretation of the word "standard" in the CAA's

preemption language was flawed). Additionally, the Court held that it made "no sense" to treat sales restrictions and purchase restrictions differently for preemption reasons. *Id. at 255* ("The manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them."). For the same reasons stated in *Engine Manufacturers,* EPCA preemption applies equally to state and local fuel economy laws addressing the purchase of vehicles.

Defendants make several arguments against preemption. First, they urge that the 25/30 Rules [*30] do not "relate to" fuel economy standards because the 25/30 Rules do not interfere with the objectives of the EPCA. To support this argument Defendants quote a passage from a NHTSA rulemaking report, which states: "EPCA's express preemption provision cannot be interpreted as preempting all State laws relating to a fuel economy standard, no matter how tangential the relationship." *See* Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, *71 Fed. Reg. 17566, 17670 (April 6, 2006)*. This quote is taken out of context. When the entire passage is read it becomes clear that the statement summarizes NHTSA's view that not all *emissions* standards should be preempted under the EPCA, a position endorsed by this Court. *See infra* Part IV(B)(2).

Defendants also argue that federal jurisprudence is moving toward an interpretation of the term "related to" in preemption cases as meaning "actually interfering" with the relevant federal regulation. *See Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77, 82 (2d Cir. 1997)* ("'Related to' appears to be developing, to some degree, to mean whether state law actually 'interferes' with the purposes of the federal statute."). Thus, Defendants urge, [*31] because the 25/30 Rules do not actually interfere with the purpose of the EPCA, the rules should not be preempted. This argument, however, is no longer tenable in light of the Supreme Court's decision in *Engine Manufacturers.* The Court found that even though the emissions regulations at issue had a limited impact on the goals of the CAA, allowing one state to enact such a rule could have an unwanted aggregate effect if many states followed suit. *See Engine Mfrs., 541 U.S. at 255* ("[I]f one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme."). The teaching of *Engine Manufacturers* requires the rejection of Defendants' argument that "related to" means "actually affecting" or "interfering."

Second, Defendants claim that the 25/30 Rules are exempted by the "own use" savings clause in *§ 32919(c)* of the EPCA. Defendants argue that taxis are uniquely part of New York City's public transportation system, and that the language of *§ 2300* of the New York Charter reflects the TLC's role in regulating taxis as part of the City's public transportation network. Defendants also claim that the City's [*32] regulation of the taxicab industry through its licensing system transforms the City into a participant of the taxicab industry, and thus they are protected by the market participant doctrine. This argument tortures both language and logic.

Defendants might be exempted from preemption if they could show that the City was a participant in the taxicab industry and that the imposition of the 25/30 Rules was not the act of a market regulator. In *Boston Harbor*, the Court found that the market participant exception could apply when a state act was more akin to proprietary conduct than to government regulation. *507 U.S. at 232*. Likewise, the Court in *Engine Manufacturers* noted that its CAA preemption decision did not reach the question of whether some of the fleet restrictions were valid as internal state purchase decisions. *541 U.S. at 258-59*. On remand, the Ninth Circuit held that the market participant doctrine allowed state and local government entities "to use their own money to acquire or use vehicles that exceed the federal standards." *Engine Mfrs., 498 F.3d 1031, 1043 (9th Cir. 2007)*. The Ninth Circuit found that the fleet restrictions, limited to the purchase and use of vehicles by [*33] the state and local government entities, were proprietary actions, rather than regulatory actions. *Id. at 1045-46*. Accordingly, the state could impose restrictions on vehicles procured by state municipalities under the market participant doctrine.

The TLC's 25/30 Rules are not analogous to the fleet restrictions that the Ninth Circuit permitted under the market participant doctrine. The TLC's rules apply to all privately owned, licensed yellow taxicabs in New York City, while the fleet restrictions that the Ninth Circuit allowed in *Engine Manufacturers* applied only to vehicles procured by state and local governmental entities for their own use. *498 F.3d at 1039*.

The City's argument that the nature of the TLC's medallion system makes the City a market participant is fanciful. At oral argument, Defendants claimed that the

medallion regulation system gives the City ownership and control of the industry, and that this role as gatekeeper into the taxicab business somehow makes the TLC a market participant. (*See* Oral Arg. Tr. 33:07-13; 33:21-34:02.) Defendants also argued that the "own use" exception of *§ 32919(c)* applies because the 25/30 Rules relate to improving the City's public transportation [*34] system through efficient procurement of taxis, outsourced to private companies. (*Id.* 28:11-16; 33:07-13.) The Defendants' position on their role as taxicab industry participant, rather than regulator, is not supported by the City Charter, by case law, or by common sense.

As written, the 25/30 Rules present taxi owners with an alternative: provide a service to the handicapped or buy a vehicle with improved fuel economy. *See* TLC Rule § 3.03(c)(10)-(11). This is the kind of mandate that only a regulator makes--it is not typical of what a proprietor would do for itself, and it would be a strange choice to impose for one's own use. Furthermore, the process the City followed in promulgating the 25/30 Rules belies any claim that the City is acting as a proprietor rather than a regulator. The City published notice of its intent to adopt new TLC rules in the City Record, took public comments, and then adopted the new rules. It even held additional public hearings. (*See* Pejan Decl. Ex. 21; Ex. 22; Ex. 23; Ex. 25; Ex. 28.) This is not the kind of conduct the City engages in when it purchases vehicles for its own use. Internal administrative actions do not require notice, public comment, or hearings. [*35] The procedures the City followed are the actions of a regulator, not of a proprietor. The City Charter, which is the source of the TLC's power to act, specifies: "The jurisdiction, powers and duties of the commission shall include the *regulation* and supervision of [the taxicab industry]." *See N.Y. City Charter § 2303(a)* (emphasis added). The TLC is clearly a regulator which routinely prescribes what the City's taxicabs may do. That is what it did when it mandated the new fuel economy standards. As such, it does not qualify for an exception as a market participant.

For essentially the same reasons, Defendants cannot reasonably claim that the 25/30 Rules fall under the "own use" savings clause. The rules regulating private taxicab acquisition and use are materially and substantially different than the City's conduct when it buys the tens of thousands of police cars or other vehicles for the wide variety of fleets that the City owns, operates, and maintains. The City pays for them with its own funds, takes title to them, and then uses them exclusively for its own purpose. Taxicabs, conversely, are intended for private ownership, albeit regulated by the City. While the Court acknowledges [*36] that taxicabs may be part of the public transportation system, that does not mean that taxis are for the City's own use. Regulators are not the owners; for example, the New York State Public Service Commission does not own public utilities; the shareholders do. Another simple example illustrates the point: if a police car hits a pedestrian walking in the street, that pedestrian may have a lawsuit against the City. If a taxicab hits the same pedestrian, however, the pedestrian may sue the private taxi company, not the City. Defendants do not fall into either the "own use" exception to preemption under *§ 32919(c)* or into a market participant exception.

Defendants' final argument against preemption of the 25/30 Rules under the EPCA is that they fall into the "own use" or the market participation exceptions based on language in a judgment of February 7, 2008 by the district court in California on final remand in *Engine Manufacturers*. The judgment was based upon a stipulated settlement that the fleet restrictions were "not preempted by the Clean Air Act Section 209(a), *42 U.S.C. § 7543(a)*, in so far as they direct the purchasing, procuring, leasing, and contracting decisions of state and [*37] local government entities . . . *and private entities under contract to, or operating under an exclusive license* or a franchise with, state and local government entities." (*See* Pejan Decl. Corrected Ex. 3 P 1) (emphasis added). There is absolutely no evidence of how this bargain was struck, what its true purpose is, or why the parties decided to settle. Nevertheless, the City claims that this settlement supports the position that since the taxicabs are exclusively licensed by the City, the 25/30 Rules are not preempted. The Court rejects this argument. To begin, a settlement is not a decision on the merits, thus this stipulated judgment from the California district court has no precedential value whatsoever. Secondly, while the TLC exclusively licenses the many private taxicab operators in New York City, that is not the same as saying that each private taxi operator is an exclusive licensee of the TLC.

A plain reading of the EPCA preemption clause, *§ 32919(a)*, and the 25/30 Rules leads to the conclusion that the 25/30 Rules relate to fuel economy standards and are most likely expressly preempted by the EPCA. Defendants' counterarguments--that the rules do not

"relate to" fuel economy [*38] standards, that the City falls into the "own use" savings clause, that the City is a market participant--are unconvincing. Accordingly, Plaintiffs have shown a likelihood of success on the merits on this part of their claim.

B. Preemption Under the CAA

The Clean Air Act empowers the Environmental Protection Agency ("EPA") to promulgate regulations necessary to prevent deterioration of air quality. *42 U.S.C. § 7601(a)*; *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151, 1156 (E.D. Cal. 2007)*. Part of the EPA's mandate under the CAA is to set standards relating to emissions from new vehicles. *42 U.S.C. § 7521(a)(1)*. The CAA also contains a preemption provision at § 209(a):

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines . . . No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling . . . or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7543(a).

While [*39] the CAA only relates to the regulation of vehicle and engine *emissions*, Plaintiffs argue that the TLC 25/30 Rules--which govern fuel economy--are a *de facto* regulation of emissions and that the purpose of the rules is to regulate emissions. (*See* Saylor Decl. Ex. A PP 100-02.) The issue here is whether Plaintiffs have a likelihood of success in demonstrating that TLC regulations imposing fuel economy standards are preempted by the CAA when the regulations at issue do not mention or target emissions.

1. Relevant Case Law

A state or municipal law that clearly targets emissions in new vehicles is generally preempted under the CAA. For instance, courts have held that § 209(a) preempts states from requiring that a percentage of new vehicles certified for sale in that state be "zero emissions vehicles" ("ZEVs"). *See Am. Auto. Mfrs. Ass'n v. Cahill, 152 F.3d 196, 200 (2d Cir. 1998)* (finding that while the New York law did not "impose precise quantitative limits on levels of emissions," the ZEV sales requirement nevertheless "must be considered a standard 'relating to the control of emissions'" because the law had no purpose other than to effect a general reduction in emissions); *see also Ass'n of Int'l Auto. Mfrs., Inc. v. Comm'r, Mass. Dept. of Envtl. Prot., 208 F.3d 1, 6 (1st Cir. 2000)*.

Two [*40] 2007 cases examined a preemption question parallel and relevant to the one here. In *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007)*, and *Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007)*, the courts determined that the EPCA--a fuel economy regulation--did not preempt state laws relating to emissions, even where the state's emission rules had an impact on fuel economy.

In *Green Mountain*, the state of Vermont passed a law establishing strict emissions standards for new automobiles. The main issue in the case was whether the EPCA and CAA conflicted with each other in relation to the state's regulation of greenhouse gas ("GHG") emissions. *508 F. Supp. 2d at 344*. In a related issue, the court found that because Vermont's law targeted emissions and not fuel economy standards, it was not preempted by the EPCA. *Id. at 352-55*. First, the court rejected the plaintiffs' arguments that the emissions rule was a *de facto* fuel economy standard because the evidence in the case showed that "compliance with the regulation is not achieved solely by improving a fleet's fuel economy." *Id. at 352-53*. Second, the court looked at [*41] the language of the EPCA preemption statute, *49 U.S.C. § 32919(a)*, and determined that Congress did not intend that rules related to emissions "be automatically subject to express preemption as a 'law or regulation relating to fuel economy standards.'" *Id. at 354*.

Likewise, in *Central Valley*, the court also found that a state law regulating vehicle emissions was not preempted under the EPCA. In looking at the EPCA preemption statute, the court found that the statute should preempt "only those state regulations that are explicitly aimed at the establishment of fuel economy standards, or that are the *de facto* equivalent of mileage regulation . . . ." *529 F. Supp. 2d at 1175*.

2. Application

Plaintiffs argue that the 25/30 Rules should be preempted under the CAA because, even though the TLC rules regulate fuel economy, their purpose and effect is to regulate emissions, which is the exclusive province of the federal government. This argument would appear to be foreclosed under the reasoning of *Green Mountain* and *Central Valley*, where the courts found that GHG emissions regulations were not preempted by the EPCA because the regulations were not *de facto* fuel economy standards and because emissions [*42] regulations do not "relate to" fuel economy standards within the meaning intended by Congress in the EPCA preemption statute. *See Green Mountain, 508 F. Supp. 2d at 353-54*; *Cent. Valley, 529 F. Supp. 2d at 1176*.

In this case the argument is reversed--Plaintiffs claim that a fuel economy regulation should be preempted by the CAA, which exclusively governs emissions regulation. Plaintiffs have failed to show a likelihood of success on this issue because both *Green Mountain* and *Central Valley* make clear that the preemption provisions of the EPCA and the CAA relate specifically to their defined categories--fuel economy and emission regulation, respectively--and while they may overlap, they do not conflict. Thus, crossover between the two for preemption purposes is not automatic. *Cent. Valley, 529 F. Supp. 2d at 1175*. It follows that Plaintiffs here cannot simply stretch the CAA's preemption provision for emissions regulation to cover the 25/30 Rules, which by their terms cover only mileage standards and are silent as to emissions.

Plaintiffs fail to show how the 25/30 Rules are a "standard relating to the control of emissions from new motor vehicles," as required under the preemption provision [*43] of CAA § 209. At this stage of the proceedings the Court cannot accept Plaintiffs' argument that the only purpose of the 25/30 Rules is to affect emissions. As indicated, the Court has limited its review to the stated purpose of the rules, as published in the City Record, which is to "result in industry-wide gasoline savings of approximately $ 60,000,000 per year. These savings are expected to increase the economic health of the industry by decreasing driver costs . . . and to further benefit the public by reducing upward pressure on taxicab fares." (*See* Pejan Decl. Ex. 25 at 4989.) The rules say nothing about emissions. But even if emissions reduction is a consequence of the 25/30 Rules, it does not follow that the rules are necessarily a *de facto* regulation of emissions preempted by the CAA. *See Cent. Valley, 529 F. Supp. 2d at 1176*.

The Plaintiffs have not demonstrated a likelihood of success that the CAA expressly or impliedly preempts the 25/30 Rules. Plaintiffs have not shown that the rules are a "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines," *42 U.S.C. 7543(a)*, nor is it clear that Congress intended the CAA to preempt state [*44] or municipal fuel economy regulations where the regulations were not *de facto* emissions regulations. Accordingly, the Court cannot grant an injunction on the basis that the CAA preempts the TLC regulations on fuel economy standards.

CONCLUSION

The Court finds that Plaintiffs have standing, they will be irreparably injured because they are unable to recover the costs associated with compliance, and the Plaintiffs have demonstrated a likelihood of success of showing that the EPCA, *49 U.S.C. § 32919(a)*, preempts the TLC regulations. The City's counterarguments do not convince the Court otherwise. Plaintiffs' motion for a preliminary injunction is GRANTED.

Dated: New York, New York

October 31, 2008

SO ORDERED

/s/ Paul A. Crotty

PAUL A. CROTTY

United States District Judge