Exhibit C

To the Supplemental Attorney Affirmation of Benjamin F. Neidl in Support of Motion to Intervene (Oct. 6, 2019)

Amended Proposed Memorandum of Law in Support of Intervenor-Petition

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of

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

Petitioners,

and

THE NEW YORK STATE VAPOR ASSOCIATION, INC., VNY MIDTOWN LLC d/b/a VAPENY, and PROHIBITION JUICE COMPANY LLC,

Index No.: 906514-19

Intervenors-Petitioners,

-against-

ANDREW M. CUOMO, *et al.*,

Respondents.

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

MEMORANDUM OF LAW IN SUPPORT OF PETITION

By Intervenors-Petitioners New York State Vapor Association, Inc., VNY Midtown LLC d/b/a VapeNY and Prohibition Juice Company LLC

Benjamin F. Neidl
JACKSON LEWIS, P.C.
Attorneys for Intervenors-Petitioners
677 Broadway – 9th Floor
Albany, N.Y. 12207
(518) 512-8700
Benjamin.Neidl@jacksonlewis.com

PRELIMINARY STATEMENT

The Intervenors-Petitioners New York State Vapor Association ("NYSVA"), VNY Midtown LLC d/b/a VapeNY ("VapeNY") and Prohibition Juice Company LLC ("PJC"), collectively the "Intervenors," respectfully submit this Memorandum of Law in support of their Intervenor-Petition.

INCORPORATION OF PETITION AND SUPPORTING AFFIDAVITS

In the interest of brevity, the Intervenors will not re-state all of their factual allegations in this Memorandum of Law. Rather, the Intervenors respectfully incorporate by reference their Verified Intervenor-Petition, the Affidavit of Spike Babaian of VapeNY (the "Babaian Affidavit"), and the Affidavit of Joseph Dammacco of Prohibition Juice Company LLC (the "Dammacco Affidavit"). We will refer to these documents from time to time in the argument below.

ARGUMENT

POINT I

The Regulations Must be Enjoined and Annulled Because They Offend the Constitutional Separation of Powers and Exceed the Respondents' Regulatory Authority.

It is axiomatic that the New York State Constitution vests legislative authority in the Senate and the Assembly, and vests administrative powers in the Governor and the administrative agencies of the State. *See* N.Y. Const. Arts. III and IV.

The legislative branch holds the "fundamental policy-making responsibility" in New York. Boreali v. Axelrod, 71 N.Y.2d 1, 9 (1987). Administrative agencies have the authority to engage in "interstitial rule-making" (id. at 13)—that is, to make regulations that are tethered to the statutory enactments of the Legislature, and which fill in the "gaps" sometimes left by those

statutes. Hispanic Chambers of Comm. v. NYC Dep't of Health and Mental Hygiene, 23 N.Y.3d 681, 699 (2014)(describing regulatory rule-making as the power to "fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation"). But administrative regulations "must be consistent with and have a basis in the [legislation] itself; the statute is charter of the [agency's] authority." Health Ins. Ass'n v. Corcoran, 154 A.D.2d 61, 66 (3d Dep't 1990), aff'd 76 N.Y.2d 995 (1990). "Even under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evil it perceives." Boreali, 71 N.Y.2d at 9. "It is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." Hispanic Chambers of Comm., 23 N.Y.3d at 697.

Boreali is the seminal case regarding the limits of administrative rule-making in New York. In that case, the Court of Appeals struck down Department of Health regulations which banned smoking in various public spaces, such as schools, stores and hospitals. 71 N.Y.2d at 7. The stated purpose of the regulation was to protect bystanders from passive smoke. The Department claimed that its authority to pass the regulations came from Public Health Law §225—*the exact same statute that the Respondents cite in this case,* in their Regulatory Impact Statement and Emergency Justification. Section 225(a) confers authority on PHHPC to develop the State Sanitary Code, which generally may "deal with any matters affecting the security of life or health or the preservation or improvement of the public health []." In Boreali, the Court of Appeals held that that general grant of authority does *not* empower the Department to adopt regulations "embodying its own assessment of what public policy ought to be." Id. at 9. As the Court explained:

> While the Legislature has given the Council broad authority to promulgate regulations on matters concerning public health, the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative rather than a

> legislative body. In this instance, the Council usurped the latter (legislative) role and thereby exceeded its legislative mandate [].

Id. at 6.

The Court discussed four factors which guided it to its decision that the Department of Health overstepped its bounds. Id. at 11-14. These have since come to be known as the "Boreali factors," and the Court has used them as a framework in all subsequent cases reviewing the limits of administrative authority. These factors are: (1) whether the agency intruded on legislative functions by balancing competing societal interests or concerns; (2) whether the agency made its regulations on a "clean slate" without the benefit of legislative guidance; (3) whether the legislature itself has acted in the particular area of regulation, or whether it has declined to act; and (4) whether the regulation was the product of the agency's "special expertise or technical competence" in the area. Id.

No single one of these factors is dispositive. Rather, the Court has explained that it does "not regard the four circumstances as discrete, necessary conditions that define improper policymaking by an agency, nor as criteria that should be rigidly applied in every case []." Hispanic Chambers of Comm., 23 N.Y.3d at 696. Rather, these issues are "overlapping, closely related factors that, taken together, support the conclusion that an agency has crossed that line." Id. The court may find that an agency has exceeded its authority even when some, but not all, of the factors point toward unlawful action. For example, in Hispanic Chambers of Comm., the Court struck down New York City's ban on sugary beverages on the strength of the first three Boreali factors alone, without applying the fourth. See 23 N.Y.3d at 700-01.

That notwithstanding, in this case all four Boreali factors support the conclusion that the Respondents have exceeded their authority in adopting the regulations banning most flavored e-liquids.

1. The Respondents have intruded on legislative functions by balancing competing societal interests and concerns.

The first of the Boreali factors goes to the heart of the distinction between legislative and administrative functions. "[S]triking the proper balance among health concerns, cost and privacy interests … is a uniquely *legislative function*." Hispanic Chambers of Comm., 23 N.Y.3d at 697 (emphasis added), quoting Boreali at 71 N.Y.2d at 12. A state agency may, within reason, adopt regulations that are means to an end that the legislature has prescribed by statute. But, "to the extent that the agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector, it [acts] solely on its own ideas of sound public policy and [is] therefore operating outside its proper sphere of authority." Boreali at 71 N.Y.2d at 12. "[V]alue judgments that entail[] difficult and complex choices between broad policy goals [are] choices reserved to the legislative branch." Hispanic Chambers of Comm., 23 N.Y.3d at 698.

In this case, the Respondents' regulatory ban on flavored e-liquids plainly involved value judgments and choices between policy goals.

Indeed, the Respondents explicitly weighed the competing interests of adult consumers who can lawfully purchase these products under the Public Health statutes, and the putative health needs of young people who cannot. And, in doing so, the Respondents made a value judgment to ban sales to *all consumers* in favor of, ostensibly, protecting young people from exposure to flavored e-liquids (through unauthorized access by adults, or false I.D., etc.). The Respondents' Regulatory Impact Statement and Emergency Justification repeatedly state that the purpose of the regulation is to shield "youth" from flavored e-liquids. Consider the following excerpts:

- "Emergency regulations are necessary to address the alarming increase of e-cigarette use among New York's youth. New York State-specific surveillance data shows that youth e-cigarette use has risen at a dramatic rate over just the last four years … Therefore, restricting the availability of

> flavored e-liquids will deter youth from initiating e-cigarette use…" (NYSCEF Doc. #3 pg. 4.)
>
> - "The dramatic increase in use of e-cigarettes by youth is driven in large part by flavored e-liquids…" (Id. pg. 6.)
> - "Swift interventions are needed to protect our youth from a lifetime of addiction to nicotine." (Id. pg. 18.)
> - "[T]he rate of smoking by youth is increasing…" (Id.)

(See also id. pg. 5, 19 and20.)

Of course, "youth" is already prohibited *by statute* from purchasing e-liquids. The current version of Public Health Law Article 13-F prohibits the sale of e-cigarettes and related products to anyone under the age of 18. See Public Health Law §§1399-bb(4); 1399-cc(2). Amendments to Article 13-F, which go into effect in November, will prohibit the sale of these products to anyone under the age of 21. Thus, New York already has laws that are aimed at shielding youths from flavored e-liquids.

The thing that is new in the regulation—*the subjective value judgment that the Respondents made in that regulation*—is the decision to invade the privacy of *adult* (legal age) purchasers in order to "protect" youths from secondary exposure. The Respondents state in their Regulatory Impact Statement that they have decided to ban the sale of flavored e-liquids to everyone (even people who are 21 and older) because they believe the statutory age limit will be difficult to enforce:

> Enforcement of minimum age statute and prohibitions on school grounds are especially difficult given that most products are sleek and easy to conceal by youth users.

(NYSCEF Doc. #3 pg. 5.)

That is clearly a "balancing of interests" among societal interests—the privacy of older consumers to purchase products that they are allowed to by statute, against the putative health

needs of younger people to be shielded, apparently at all costs. That is, without question, precisely the type of "[v]alue judgment[] that entail[s] difficult and complex choices between broad policy goals," which are "choices reserved to the legislative branch." Hispanic Chambers of Comm., 23 N.Y.3d at 698. "Devising an entirely new rule that significantly changes the manner in which [consumable products] are provided to customers … is not an auxiliary selection of means to an end; it reflects a new policy choice." Id., 23 N.Y.3d at 700 (striking down regulations against sugary beverages).

The Respondents also stepped into the domain of the Legislature by, at least ostensibly, weighing the putative health needs of youths against the business interests of the retailers, wholesalers and manufacturers of flavored e-liquids in New York. We say "ostensibly," because the record reveals that the Respondents' diligence in this area was quite shallow, with only conclusory discussion of the potential harm to the industry. (See NYSCEF Doc. #3 pg. 9, 12.) Nevertheless, the Respondents' Regulatory Impact Statement and Regulatory Flexibility Analysis do acknowledge that the regulations will come at a cost to actors in the industry, and they determined to proceed anyway. (NYSCEF Doc. #3 pg. 9 ["The regulation will impose costs, in terms of lost sales, for private regulated parties…] and 12 ["The amendment will affect small businesses that are engaged in selling flavored e-liquids or e-cigarettes"].) In so doing, the Respondents "built a regulatory scheme on [their] own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector []." Boreali at 71 N.Y.2d at 12. For that separate and distinct reason, the Respondents usurped the legislative function.

Accordingly, the first Boreali factor shows that the Respondents have unlawfully acted in excess of their authority.

2. The Respondents have written on a "clean slate," with no legislative guidance.

The second factor is concerned with whether the Legislature has passed enabling legislation that authorizes new regulation within defined parameters, or whether the agency has acted purely of its own accord—what Boreali called a "clean slate." As the Court explained it, the Legislature may expressly delegate guidance to regulators by statute, "with reasonable safeguards and standards to [the] agency or commission to administer the law as enacted by the Legislature." 71 N.Y.2d at 10. Indeed, in some cases when the Legislature adopts a new act, it includes a section expressly directing the regulatory agency to promulgate regulations implementing it, with express guidelines. See, e.g. Public Health Law §2786 (directing the Department of Health to promulgate regulations to implement Public Health Law Article 27-F regarding access to HIV and AIDS-related information, and prescribing guidance for regulations).

Here, there is no such legislative predicate or guidance—the Respondents have acted purely of their own volition and have written on a clean slate. See Corcoran, 154 A.D.3d at 73 ("Respondent has not cited to any section of the Insurance Law directly addressing the policy choices involved in [its regulation]"). Clearly, the sole statute that Respondents cite in their Regulatory Impact Analysis—Public Health Law §225—is not a predicate for the regulation. In Boreali, the Court of Appeals held that that very statute (which only generally grants PHHPC duties with regard to the Sanitary Code) did not authorize the Department's brand new policy of banning smoking in public places to mitigate secondhand smoke. It is no more a predicate for the Respondents' sweeping policy determination here to ban the sale of most flavored e-liquids.

In fact, not only is there no legislative predicate for what the Respondents have done—the regulation is actually at odds with the Legislature's most recent action in this area. As discussed below, recent proposals to ban flavored e-liquids in the Legislature have failed, and instead the

Legislature opted in 2019 to raise the minimum purchaser age from 18 to 21—thereby signaling continued approval of sales to persons who are 21 and older.

Accordingly, the second factor shows that the Respondents have unlawfully acted in excess of their authority.

3. Legislative history in this area demonstrates that the legislature, as the chief policy-making body in the State, has so far declined to ban flavored e-liquids, and has instead embraced a different approach.

The third Boreali factor considers whether prior legislative action or inaction indicates that the issue has been a matter of legislative concern. In that case, the Court explained:

> A third indicator that the PHC exceeded the scope of the authority properly delegated to it by the Legislature is the fact that the agency acted in an area in which the Legislature had repeatedly tried -- and failed -- to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions.

71 N.Y.2d at 13 (internal citations omitted). The Court thus concluded that it should remain "the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among [the] competing ends" involved in the area of secondhand smoke.

Likewise, here, the Legislature has, in recent years, actively considered various new approaches to regulating flavored e-liquids and e-cigarettes. In 2017 and again in 2019, legislators introduced bills to ban flavored e-liquids, but those bills failed to gain enough support to earn a vote on the floor. (Intervenor-Petition ¶¶36-37.) In 2019, other legislators proposed an alternative bill, which would have instead prohibited the sale of tobacco or electronic cigarettes within 200 feet of a school or place of worship. (Id. ¶39.) Yet another proposal in 2019 was to add a new Article 24-D to the General Business Law, which would have prohibited the sale of electronic cigarettes on school grounds, on billboards, shopping malls, and certain other public places. (Id. ¶40.) But the Legislature did not elect to pass any of those bills, either.

What the Legislature ultimately *did* do in 2019, was further embrace the existing regulatory scheme in Public Health Law Article 13-F, with amendments to that Article to raise the minimum purchaser age to 21. Thus, the Legislature, in its collective wisdom, elected to endorse the controls that are already on the books (requiring purchaser identification, keeping inventory in secure locations, posting signage, *etc.*), with an age increase to 21, thereby allowing continued sales of e-cigarettes and e-liquids to customers over the age of 21 with proper identification. If the Legislature had wanted to ban flavored e-liquids to all consumers it would have done so. It did not. The Executive branch cannot seize that issue for itself by regulatory fiat.

Accordingly, the third factor shows that the Respondents have unlawfully acted in excess of their authority.

4. The disputed regulations are not the product of any special expertise or technical competence of the Respondents.

Finally, in Boreali, the Court also found it significant that the public smoking ban in that case did not derive from any "special expertise or technical competence in the field of health." 71 N.Y.2d at 14. The Court noted that "although indoor smoking is unquestionably a health issue," the Department of Health's ban was really just a policy determination based generally on "mounting evidence about hazards to bystanders of indoor smoking." Id. The smoking ban did not, for example, prescribe rules for medical or nursing standards that would or should only be authored by persons with expertise in those fields. Id.

The same is true here. For one thing, the decision to ban sales to *all consumers*—even consumers over 21 years old—was, explicitly, not driven by technical exercise with regard to the health of adult c-cigarette users. Instead, the stated purpose of the regulations is to keep flavored e-cigarettes away from youths, and the Respondents made a simple logistical choice to ban sales to *everyone* purportedly because age restrictions are "difficult" to enforce. (*See* pg. 5-6 above.)

That was a decision of operational convenience, not expertise in medicine. Proposing an outright ban on something as a matter of subjective preference is not an exercise of special expertise or technical competence under Boreali. See Corcoran, 154 A.D.3d at 72-74 (striking down Insurance Department ban on certain health insurance underwriting practices).

Furthermore, the Respondents' "Regulatory Impact Statement" and "Emergency Justification" do not evidence any significant firsthand study by DOH or PHHPC themselves about the effects of flavored e-liquids on minors, or about the wisdom (or lack thereof) in eliminating access to persons aged 21 years or older. Rather, the Respondents cite facts and figures from other publicly available sources purportedly regarding trends in e-cigarette usage (which anyone could read), and from those simply leap to the rule of an outright ban, without consideration of alternatives, or consideration of whether and to what extent the ban on e-liquids may cause users to turn instead to traditional tobacco products.

In fact, the publicly-available information shows that the idea for the ban came from the Governor, and was imposed by the Governor's office on a top-down basis. This train of events began with a public release by the Department of Health on September 5, 2019, of a warning about a much more discrete issue: the presence of vitamin E acetate in some *black market, cannabis-containing samples of e-liquids*. (Intervenor-Petition Exh. A.) The release warned the public against use of those types of black market products, but did not proffer any study or findings recommending the ban of lawfully-sold, mainstream e-liquids. Two days later, in a public statement, the Governor seized on this and, making only passing reference to the problem of vitamin E acetate (in black market cannabis-containing samples) impulsively called for an outright ban on vaping products.

> New York State is going to issue health guidance either today or tomorrow that says people should not be using vaping products

> period, which is basically what the CDC is saying. There have been a number of deaths. There is an investigation ongoing. Nobody knows exactly what it is. There is some suggestion that it is liked to Vitamin E, et cetera. Our health guidance is no one should be using vaping products period until we know what it is.

(Intervenor-Petition Exh. B.) The Respondents adopted the disputed regulations only days later, after an extraordinary swift and truncated process. Nothing about this record bespeaks a technical exercise in the parlance of Boreali.

Accordingly, the fourth Boreali factor also shows that the Respondents have unlawfully acted in excess of their authority. For these reasons alone, the regulations must be enjoined and annulled.

POINT II

Alternatively, the Regulations Must be Enjoined and Annulled Because They are Arbitrary and Capricious.

Even if the regulations were not void for being in excess of the Respondents' administrative powers (which they are) they must still be enjoined and annulled because they are arbitrary and capricious within the meaning of CPLR §7803(3).

"The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified … and whether the administrative action is without foundation in fact." Law Enforcement Officers Union v. State, 168 Misc. 2d 781, 785 (S. Ct. Albany Co. 1995)(internal quotations omitted), aff'd 229 A.D.2d 286 (3d Dep't 1997). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. See also Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). The regulations at issue here are arbitrary and capricious for several reasons.

First, as the Petitioners correctly argue in their Petition and supporting Memorandum of Law, it is wholly arbitrary for the Respondents to ban the sale of flavored e-liquids to all consumers

(ostensibly to protect "youth") when they allow the continued sale of combustible tobacco cigarettes—which are also illegally used by youth—while banning a large swath of substantially less harmful vapor products. As the Petitioners document significantly, ample scientific evidence demonstrates that e-cigarettes are plainly more healthy than traditional tobacco cigarettes. (VTA Petition ¶¶34-44.)

Second, there is no factual record justifying the sweeping ban of flavored e-liquids. As noted, the Department's September 5, 2019 announcement which set these events in motion was only concerned with the more discrete issue of vitamin E acetate being found in some black market samples of Cannabis-containing products. It was the Governor, just two days later and with no apparent intervening study, who announced in sweeping fashion that "people should not be using vaping products period." (Intervenor-Petition Exhibit B.) This was, in effect, taking a blunt instrument to an issue (vitamin E acetate in black market samples) that perhaps called for a scalpel. The emergency regulations that followed impulsively in a matter of mere days, were not proportional or responsive to those DOH findings that prompted them in the first place.

Third, it is manifestly arbitrary and capricious to ban the sale of most flavored e-liquids to *all* consumers when the stated purpose of the regulations (in the Regulatory Impact Statement and Emergency Justification) is to stem use of those products by "youths"—*i.e.*, of people who are not legal age. (See pg. 4-5, above.) The Respondents' conclusory assertion that the age restrictions set forth in Public Health Law Article 13-F are "difficult" to enforce (NYSCEF Doc. #3 pg. 5) is far from sufficient to establish a "foundation in fact" (Law Enforcement Officers Union, 168 Misc. 2d at 785) for these sweeping, industry-threatening rules. Moreover, the minimum age increase from 18 to 21 that goes into effect in November (by amendments to the Public Health Law) should facilitate enforcement. It stands to reason that many minors will have more difficulty passing for

21 years of age than passing for 18 years of age. The Department's only accounting for this is to state that it will "monitor" the impact of the age increase when it goes into effect. (NYSCEF Doc. #3 pg. 21.) That will be too little, too late for the businesses that are drastically affected by the regulations.

Fourth, for that matter, the Respondents' action is also arbitrary and capricious for failure to consider the possible consequences to the vaping industry in particular, and the economy generally. The Respondents' Regulatory Impact Statement demonstrates only a bare, conclusory assessment of this problem:

> Costs to Private Regulated Parties:
>
> The regulation will impose costs, in terms of sales, for private regulated parties whose primary product line focuses on the sale of e-cigarettes, flavored e-liquids, and related products.

(NYSCEF Doc. #3 pg. 9.) There is no evidence of any diligence by the Respondents to understand the scale and extent of these "costs." As demonstrated in the Babaian and Dammacco Affidavits submitted herewith, the sales cost is in fact so dire that it will put may actors out of business.

The Respondents' "Regulatory Flexibility Analysis" reflects a similar sparseness on this subject:

> Effect of Rule:
>
> The amendment will affect small businesses that are engaged in selling flavored e-liquids or e-cigarettes. The NYS Vapor Association (http://nysve.org/) claims there are at least 700 "vape shops" employing 2700 persons across the state, although the Department cannot confirm this information as no official registration mechanism for "vape shops" currently exists.

(NYSCEF Doc. #3 pg. 12.) Due diligence in rule-making requires an agency to undertake *some* effort to "confirm" the population of actors that will be directly affected by the regulation. And, here again, the benign, conclusory remark that the regulation will "affect" these businesses reflects

no attention to the deep, existential harm that the rule will impose on them—*i.e.*, putting them out of business.

Fifth, the Respondents' action is also arbitrary and capricious for failure to consider alternatives. The record demonstrates that the Governor announced a ban based on his own preference for sweeping relief, and PHHPC and DOH indulged that preference with a regulation, nearly immediately, without any apparent consideration of other alternatives, such as improved practices for enforcing existing laws, or mandatory training requirements proposed by NYSVA (*see* Intervenor-Petition Exhibit C). The action taken by the Respondents' is among the most extreme that it could have taken, and was undertaken without a sound basis in fact.

POINT III

Alternatively, the Regulations Must be Enjoined and Annulled Because They Were Adopted in Violation of the State Administrative Procedure Act.

The Intervenors adopt and incorporate by reference the Petitioners' arguments that the adoption of the regulations on a purported "emergency" basis violates §202 of the State Administrative Procedure Act.

"By enacting SAPA 202.6, the legislature was trying to stop the practice of using emergency rule making to avoid the notice and comment period otherwise required by SAPA." Gill v. NYS Racing & Wagering Bd., 2006 N.Y. Misc. LEXIS 565, at ***20 (S. Ct. N.Y. Co. 2006). Thus, SAPA requires, "at a minimum, [that] an agency seeking an emergency rule adoption to fully articulate in writing the circumstances which give rise to the adoption on an emergency basis so as to limit this method of rule making to genuine emergencies." Chinese Staff and Workers Ass'n v. Reardon, 2018 N.Y. Misc. LEXIS 4231, at *6 (S. Ct. N.Y. Co. 2018). The agency must explain in detail why compliance with the ordinary SAPA process must be excused.

Id. Moreover, if the purported emergency flows from conditions that are not new, the agency must explain why the conditions constitute an emergency now. Gill, 2006 N.Y. Misc. LEXIS 565, at ***21. Conclusory allegations are insufficient.

As the Petitioners demonstrate plainly in their Petition and Memorandum of Law in support, the record here is conclusory, fails to explain why flavored e-liquids are any more of an "emergency" now than they were three or six months ago, and is "devoid of any facts on which to base a finding of immediate necessity." Gill, 2006 N.Y. Misc. LEXIS 565, at ***21. The Respondents have not satisfied the requirements of SAPA §202(6).

POINT IV

The Intervenors Join in, and Incorporate by Reference, the Petitioners' Arguments for Temporary and Preliminary Injunctive Relief.

The Intervenors adopt and incorporate by reference the arguments of the Petitioners in favor of the application for a temporary restraining order and preliminary injunction.

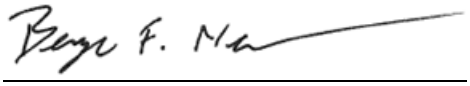
CONCLUSION

For the foregoing reasons, the Intervenor-Petition should be granted in its entirety, and the disputed regulations (10 NYCRR Subpart 9-3) must be enjoined, vacated and annulled in their entirety.

Dated: Albany, New York
October 6, 2019

Respectfully submitted,

JACKSON LEWIS, P.C.



By: Benjamin F. Neidl
Attorneys for the Intervenor-Petitioners
677 Broadway – 9th Floor
Albany, N.Y. 12207
(518) 512-8700
Benjamin.Neidl@jacksonlewis.com