STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

HOUSEHOLD AND COMMERCIAL PRODUCTS ASSOCIATION and THE AMERICAN CLEANING INSTITUTE,

Petitioner-Plaintiff,

DECISION/JUDGMENT
Index No. 06216-18
RJI No. 01-46-18-ST9885

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL STEGGOS, as Commissioner of the New York State Department of Environmental Conservation, and MARTIN BRAND, as Deputy Commissioner of the New York State Department of Environmental Conservation,

Respondent-Defendant.

APPEARANCES:

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Earthjustice
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RYBA J.,

Petitioner Household and Commercial Cleaning Products Association (HCPA) is a trade association comprised of businesses that make residential and commercial-use cleaning products, whose chief purpose is collaborating with major retailers on issues such as chemical safety, hazardous waste, labeling and ingredient communication. Petitioner, the American Cleaning Institute (ACI) is a trade organization that represents household, industrial and institutional cleaning product manufacturers, whose initiatives include creating an online ingredient disclosure program to serve as a resource for accessing and understanding information safety of ingredients used in household cleaning products. In October 2018, HCPA and ACI (hereinafter collectively referred to as "petitioners") commenced this hybrid proceeding seeking declaratory relief and a judgment pursuant to CPLR Article 78 invalidating certain purported "guidelines", entitled "Household Cleansing Product Information Disclosure Program" (hereinafter the "Disclosure Program"), issued by the New York State Department of Environmental Conservation ("DEC"). In support of their claims, petitioners contend that the Disclosure Program was a "rule" established in violation of the State Administrative Procedure Act (SAPA) and Article IV § 8 of the New York State Constitution, that it was made in excess of its statutory authority, and is arbitrary and irrational. Petitioners accordingly seek a judgment annulling the Disclosure Program and remitting the matter to DEC with the directive to comply with SAPA. Petitioners also seek a judgment declaring that DEC established the Disclosure Program in excess of its statutory authority, and an order awarding them costs and attorney's fees.

Previously, respondents moved to dismiss the hybrid proceeding on various grounds and petitioners cross-moved to stay the effective date of the Disclosure Program and for a preliminary

injunction. However, the parties have since stipulated to withdraw both motions in exchange for respondents' agreement to delay enforcement or implantation of the Disclosure Program until January 1, 2020.[1] Respondents have since served an answer in which they seek an order converting the declaratory judgment portion of this matter into an Article 78 proceeding, dismissing the converted proceeding due to lack of standing, and finding that the Disclosure Program was merely a "guideline" which was not subject to the procedural requirements of SAPA.[2] In addition, a motion has been filed by Clean and Healthy New York, New York Committee for Occupational Safety and Health, and WE ACT for Environmental Justice (hereinafter "proposed intervenors") seeking to intervene in this action for the purpose of opposing the relief requested by petitioners. Petitioners oppose the motion to intervene.

The governing statute in this matter, ECL § 35-0107, was enacted by the Legislature in 1972 as a measure to authorize the DEC to promulgate regulations requiring manufacturers of household cleaning products to disclose information relating to the chemical ingredients contained in household cleansing products. That statute provides in relevant part:

> The commissioner is hereby authorized to promulgate regulations requiring manufacturers of household cleansing products distributed, sold or offered for sale in this state, to furnish to the commissioner for the public record as herein provided information regarding such products in a form prescribed by the commissioner including the nature and extent of investigations and research performed by the manufacturer concerning the effects of such products on human health and the environment. These reports shall be available to the public at the department of environmental conservation, except those portions the manufacturer determines, subject to the approval of the commissioner, would be,

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[1]Per the agreement, if the Court has not issued a decision on the merits on or before October 1, 2019, plaintiffs reserve the right to seek a preliminary injunction.

[2]Although respondents raised a Statute of Limitations argument in the motion to dismiss that was thereafter withdrawn, they do not advance any such arguments in their answering papers.

> if disclosed, seriously prejudicial to the manufacturer's legitimate interest in trade secrets and economics of operation. (ECL § 35-0107 [1])

In 1976, pursuant to the authority granted by ECL § 35-0107, DEC promulgated 6 NYCRR § 659.6 to requiring manufacturers of cleansing products to file reports containing information regarding to the ingredients used in household cleaning products. 6 NYCRR § 659.6 sets forth that "such information shall include, but not be limited to" a list of ingredients for each product, as well the nature and extent of investigations and research performed on the effects of the ingredients on human health and the environment. Notably, the regulation excluded from disclosure those ingredients present "in trace quantities", unless "the commissioner specifically requests any such ingredient be listed". The regulation provides in relevant part:

> (a) Manufacturers of household cleansing products distributed, sold or offered for sale in this State shall furnish to the commissioner for public record such information regarding such products as the commissioner may require, in such form as may be prescribed by the commissioner. For each household cleansing product, such information shall include, *but shall not be limited to:*
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> (1) the amount of elemental phosphorus by weight as measured to the nearest one-tenth of one percent;
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> (2) a list naming each ingredient which equals or exceeds five percent of the contents of the product by weight and specifying the content by weight of each ingredient to the nearest percent;
>
> (3) a list naming each ingredient which does not equal or exceed five percent of the contents of the product by weight, provided that ingredients which are present in trace quantities need not be included on such list unless the commissioner specifically requests any such ingredient to be listed and provided further that the commissioner may require the listing of one or more of such ingredients by weight to the nearest percent;
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> (4) the nature and extent of investigations and research performed by or for the manufacturer concerning the effects on human health and the environment of such product or such ingredients; and
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> (5) a statement that the product does not contain nitrilotriacetic acid (NTA) in excess of a trace quantity.

> Ingredients shall be listed using the generic chemical name which conforms with generally accepted rules of chemical nomenclature.
>
> (b) Such manufacturers shall furnish such information semiannually or at such other times as may be required by the commissioner.
>
> (c)Such information shall be available to the public at the offices of the Department of Environmental Conservation in Albany, with the exception of those portions which the manufacturer determines, subject to the approval of the commissioner, would be, if disclosed, seriously prejudicial to the manufacturer's legitimate interest in trade secrets and economics of operation.
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> [emphasis supplied]

It is undisputed that 6 NYCRR § 659.6 was established in accordance with SAPA requirements and constitutes the sole regulation ever promulgated pursuant to ECL § 35-0107.

In 2010, in apparent response to increased public demand for cleansing product ingredient disclosure, DEC engaged various stakeholders, including petitioners and several of their member companies, to discuss issues relating to DEC's development of a new proposed program which would impact the content, format and logistics of cleansing product ingredient disclosure required by 6 NYCRR § 659.6. After meeting with the stakeholders, DEC issued the first draft of its Disclosure Program in 2011. DEC solicited comments on the first draft from petitioners and other stakeholders, but for reasons that are not entirely clear, DEC ultimately determined not to proceed with that version of the Disclosure Program. DEC did not issue a second draft of the Disclosure Program until six years later on April 26, 2017, when it published the Disclosure Program's "Certification Form" and "Guidance Document" on its website. At that time, DEC provided a brief period for public comment on the Disclosure Program but did not otherwise comply with SAPA. On September 12, 2017, DEC issued another draft of the Disclosure Program directly to selected industry stakeholders and non-governmental organizations, and requested their comments. Upon

reviewing the comments provided, DEC issued the final version of the Disclosure Program which is presently in dispute on June 6, 2018.

In its final form, the Disclosure Program imposes new substantive and procedural requirements upon cleansing product manufacturers for the disclosure of ingredient information for all "covered products". In contrast to the language of 6 NYCRR § 659.6, which did not mandate disclosure of trace ingredients, the Disclosure Program directs the disclosure of all intentionally added ingredients, even if present only in trace quantities. In addition, the Disclosure Program requires product manufacturers to disclose extensive and detailed information relating to several distinct categories of concern on their respective websites in a manner that is obvious and readily accessible to DEC and the public. Such posted information is required to include details regarding the nature and extent of the investigations and research performed to determine the effects of chemical ingredients on human health and the environment. Manufacturers are further required to submit a Disclosure Certificate Form, in which a senior management official must certify under penalties of perjury that all disclosed information is true, accurate and complete to the best of their knowledge. Manufacturers are required to review and update the published ingredient disclosures and research material any time a product or ingredient is changed, and at a minimum every two years.

As alleged in the petition, petitioners contend that the Disclosure Program constitutes a "rule" that was established in violation of the State Administrative Procedures Act (SAPA) and Article IV § 8 of the New York State Constitution. Petitioners also contend that the Disclosure Program was issued in excess of the statutory authority granted to DEC, violates the doctrine of legislative equivalency, and is arbitrary and irrational. Petitioners accordingly seek a judgment

annulling the Disclosure Program and remitting the matter to DEC with the directive to comply with SAPA, declaring that DEC established the Disclosure Program in excess of its statutory authority, and an order granting costs and attorneys fees.

Initially, respondents contend that the declaratory judgment portion of this action is improper and should be converted into a proceeding pursuant to CPLR Article 78. Petitioners offer no argument in opposition to this request. Notably, a "court may decline to entertain an action for a declaratory judgment where other adequate remedies are available, such as a CPLR article 78 proceeding to challenge and administrative determination" (Matter of Gable Transp v State of New York, 29 AD3d 1125, 1127-1128 [2006], see, Greystone Mgt. Corp v Conciliation & Appeals Bd. Oof City of NY, 62 NY2d 763, 765 [1984]). Inasmuch as the declaratory judgment aspect of this action is duplicative of the relief sought under CPLR Article 78, conversion is appropriate. The Court will therefore address the remainder of the issues raised by the parties under the standard applicable to a CPLR article 78 proceeding.

Respondents next contend that petitioners lack the necessary associational standing to maintain this proceeding. "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 769 [1991]). As a general rule, "associations have standing to challenge administrative acts which adversely affect their members" (Matter of Dental Socy. v Carey, 61 NY2d 330, 333 [1984]). In order to establish standing, an associational or organizational group, such as petitioners, must establish that its members will suffer an injury in fact as the result of the challenged agency action, and that its members' are within the "zone of interests" sought to be protected by the

statutes and/or regulations governing the dispute (see, New York State Assn. of Nurse Anesthetists v Novello, 2 NY3d 207, 211 [2004]; Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 772 [1991]).

Here, petitioners have sufficiently demonstrated that their members will suffer an injury in fact through the submission of proof indicating that the Disclosure Program will require cleaning product manufacturers to expend significant resources to fundamentally change their business practices in terms of their product testing procedures, website format, and research methods. In addition, petitioners have adequately established that their members fall within the zone of interests sought to be protected by ECL § 35-0107. This enabling legislation authorizes DEC to require ingredient disclosure by promulgating regulations, which may be created only through adherence to the procedural steps set forth in SAPA, which requires that prior to the adoption of any rule or regulation "an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule" (SAPA § 202 [1] [a]). Because petitioners allege that the Disclosure Program was established in violation of these requirements, thus depriving them of the protections afforded by SAPA as contemplated by ECL § 35-0107, petitioners allege an injury that is within the zone of interests sought to be protected by that statute (see, Matter of Association for a Better Long Is. v New York State Dept. of Environ. Cons., 23 NY3d 1 [2014]). To find otherwise "would have the effect of insulating [the Disclosure Program] from timely procedural challenge - - a result that is contrary to public interest" (Matter of Association for a Better Long Is. v New York State Dept. of Environ. Cons., 23 NY3d at 4 [2014]). Therefore, petitioners have adequately alleged associational standing to bring the present claims (see, Matter of Colella v Board of Assessors, 95 NY2d 401 [2000];

Rudder v Pataki, 93 NY2d 273, 278 [1999]; Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 773 [1991]).

The Court will next address the contention that the Disclosure Program was established in violation of SAPA and the NY State Constitution. Article IV § 8 of the New York State Constitution mandates that "[n]o rule or regulation made by any state department * * * shall be effective until it is filed in the office of the department of state." SAPA § 102(2)(a)(i) defines a "rule" as "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or * * * the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof." Every rule or regulation proposed by an agency must be promulgated "in substantial compliance" with SAPA §§ 202 (establishing general procedures for rulemaking), 202–a (requiring consideration of the regulatory impact), and 202–b (requiring consideration of regulatory flexibility for small businesses). Petitioners allege that the Disclosure Program is invalid because it constitutes a rule or regulation that could not be promulgated without first adhering to the rule-making requirements of Article 2 of SAPA. Respondents counter that the Disclosure Program is merely a "guidance document" which was properly established within the broad authority granted by ECL § 35-0107 and 6 NYCRR § 659.6, and that adherence to SAPA was therefore not required.

Courts have defined a "rule" in pertinent part as "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers" (Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health, 66 NY2d 948, 951 [1985];see, Med. Soc'y of State v Serio, 100 NY2d 854, 869 [2003]). Mere guidelines, on the other hand, do not establish substantive standards applicable to agency adjudication, but merely implement, explain or interpret an already existing standard or

requirement set forth in a regulation or statute (see, Matter of Council of the City of New York v Department of Homeless Servs. of the City of NY, 22 NY3d 150, 156 [2013]). "[A]n agency, by law, is not allowed to legislate by adding guidance requirements not expressly authorized by statute" (Matter of HLP Props., LLC v New York State Dept of Envtl. Cons., 21 Misc 3d 658, 669 [2008]; see, Matter of Medical Society of State of New York v. Serio, 100 NY2d 854, 866 [2003]; Destiny USA Development, LLC v New York State Dept. of Environmental Conservation, 63 AD3d 1568, 1570 [2009], lv denied 14 NY3d 703 [2010]).

Here, the Court finds that the Disclosure Program, which dictates a new set of rules governing the types of ingredients that must be disclosed, the manner of their disclosure, and imposes a new requirement mandating that each disclosure be accompanied by a certification of its completeness and accuracy, constitutes a clear rule and not a mere interpretative statement without any legal or binding effect. Inasmuch as respondents have failed to demonstrate sufficient compliance with SAPA, the Disclosure Program is hereby invalidated in its entirety (see, Suffolk Reg'l Off-Track Betting Corp. v New York State Racing & Wagering Bd., 11 NY3d 559, 571–72 [2008]). The Court rejects respondents' contention that the Disclosure Program was properly established because it was within the purview of 6 NYCRR § 659.6 which permitted DEC to request disclosure in a form prescribed by the commissioner of such information that "shall include, but shall not be limited to". The Court finds that the language "shall include, but shall not be limited to" must be interpreted as allowing the DEC the ability to request that petitioners *voluntarily* expand the number of elements they disclose pursuant to the regulation in the form of guidance, not *mandated* rules. If the phrase "shall include, but shall not be limited to," were interpreted as granting the DEC unlimited authority to expand and require additional disclosure rules, without going through SAPA,

that portion of the regulation would exceed the breadth of ECL § 35-0107. Furthermore, since there is no opt out provision whereby petitioners may choose to deviate from the program, the Disclosure Program is not mere guidance. As set forth above, the Disclosure Program constitutes a "rule", that was not implemented in compliance with SAPA, therefore it is hereby null and void. In view of this finding, the Court need not address petitioners' alternative arguments: 1) that the Disclosure Program was established in violation of the doctrines of legislative equivalency and separation of powers; 2) the program was made in excess of DEC's statutory authority; and/or 3) the program is arbitrary and irrational.

The Court will next consider the motion for intervention by the proposed intervenors. These non-profit organizations have failed to establish that they are entitled to intervention either as of right or by permission as there is no indication that the representation of the proposed intervenors' interests could not be adequately protected by the parties to the proceeding (see, Halstead v Dolphy, 70 AD3d 639 [2010]) or that the organizations have a direct and substantial interest in the outcome of the litigation (see, Borst v Int'l Paper Co., 121 AD3d 1343, 1346 [2014]). Nor does the Court deem it appropriate to grant the proposed intervenors' alternative request for amicus curiae status. A review of the papers before the Court reveals that all possible points of view are already presented by the parties and nothing would be served by allowing additional appearances (see, Kruger v Bloomberg, 1 Misc 3d 192, 196, 196-97 [2003] State of New York v Philip Morris, Inc., 179 Misc 2d 435, 446 [1998]; Matter of Rourke v New York State Dept. of Correctional Servs., 159 Misc 2d 324, 327 [1993];Matter of Mayer, 110 Misc 2d 346, 351 [1981]). Therefore, both both requests for intervention and amicus curiae status are denied.

Finally, as for petitioners' request for attorney's fees, a prevailing party under Article 78 may be entitled to an award of attorney's fees. A party prevails when they are awarded a substantial part of the relief sought in the lawsuit (New York State Clinical Lav. Ass'n v Keledjian, 85 NY2d 346, 352-356 [1995]). However, the decision to award attorney's fees is a matter left to the Court's sound discretion. In the present case, in the exercise of its discretion the Court does not deem it appropriate to grant petitioners attorney's fees. Accordingly, the request for such fees is denied.

To the extent that the parties' arguments have not been specifically addressed herein, they have been reviewed and found to be lacking in merit.

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the relief requested in the petition is granted in part, to the extent that the "Household Cleansing Product Information Disclosure Program" issued by respondent New York State Department of Environmental Conservation is null and void and the matter is remitted back to DEC with the directive to comply with SAPA. The remaining relief requested in the petition is otherwise denied, and it is further

ORDERED that the motion to intervene is denied, without costs.

This Memorandum constitutes the Decision and Judgment of the Court. This original Decision and Order is being returned to the attorney for the petitioners. The original papers are being transferred to the Albany County Clerk. The signing of this Decision and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

Dated: August 27, 2019

HON. CHRISTINA L. RYBA
Supreme Court Justice