IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENTS GAS & SERVICE STATIONS ASSOCIATIONS, INC., an Illinois not-for-profit corporation, a/k/a I-Gas, Plaintiff, v. CITY OF CHICAGO, Defendant.	No. 14 C 7536 Hon. Matthew F. Kennelly

DEFENDANT CITY OF CHICAGO'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

Defendant City of Chicago (the "City"), by its counsel, Stephen R. Patton, Corporation Counsel of the City of Chicago, hereby submits its response in opposition to Plaintiff Independents Gas & Service Stations Associations, Inc.'s Motion for a Temporary Restraining Order ("TRO"). Plaintiff seeks to enjoin the City from enforcing Municipal Code of Chicago ("MCC") § 4-64-180(b) (the "Flavored Tobacco Ordinance" or "Ordinance"), which prohibits the sale of flavored tobacco products within 500 feet of a school. Because Plaintiff's claim that the Flavored Tobacco Ordinance is preempted by a federal statute lacks all merit, and Plaintiff cannot establish the other requirements for injunctive relief, the motion should be denied.

INTRODUCTION

In an effort to combat the problem of youth tobacco use, the City Council passed the Flavored Tobacco Ordinance on December 11, 2013. *See* Am. Compl. ¶ 16, ECF No. 5. The Ordinance amends the MCC to include Section 4-64-180(b), which bans the sale of all flavored tobacco products "at any location that has a property line within 500 feet of the property line of

any public, private, or parochial elementary, middle, or secondary school located in the City." Am. Compl. Ex. A (Flavored Tobacco Ordinance) at 3. The ban "does not apply to retail tobacco stores." *Id.* at 3-4.[1] The Ordinance also adds Section 4-64-098, which defines a "flavored tobacco product" as:

> any tobacco product that contains a constituent that imparts a characterizing flavor. As used in this definition, the term 'characterizing flavor' means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product, including, but not limited to, tastes or aromas of menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, and any spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate such statements, that a tobacco product has or produces a characterizing flavor shall establish that the tobacco product is a flavored tobacco product.

Id. at 3.

Plaintiff is an association of owners and operators of gasoline service stations with onsite convenience stores that sell, among other items, tobacco products.[2] Pl.'s Mem. in Supp. of Mot. for TRO at 1, ECF No. 10. In its motion for a TRO, Plaintiff asserts a single claim: that the

[1] Retail tobacco stores earn at least 80% of their gross revenue from the sale of tobacco products. *See* MCC § 7-32-010.

[2] Public records indicate that Plaintiff was involuntarily dissolved as of May 9, 2014, before the Ordinance went into effect and Plaintiff's claim accrued. *See* Ex. A; *see also* http://www.cyberdriveillinois.com/departments/business_services/corp.html (search Plaintiff's name to obtain "corporation file detail report") (last visited Oct. 29, 2014). Plaintiff lacks the legal capacity to challenge the Ordinance. Under Federal Rule of Civil Procedure 17(b)(2), a corporation's capacity to sue is determined "by the law under which it was organized." Under Illinois' corporate survival statute, 805 ILCS 5/12.80, claims may be asserted by a dissolved corporate entity only when the cause of action accrued *before* dissolution. *A Plus Janitorial Co., Inc. v. Grp. Fox, Inc.*, 2013 IL App (1st) 120245, at ¶ 21, 988 N.E.2d 178, 184 (Ill. App. Ct. 2013) ("[A]ny rights, claims, or liabilities preserved by section 12.80 . . . must be raised in a cause of action that actually *accrued* predissolution.").

Flavored Tobacco Ordinance is preempted by the Family Smoking Prevention and Tobacco Control Act ("FSPTCA"), 21 U.S.C. § 387 *et seq*.[3]

LEGAL STANDARD

In order to obtain preliminary injunctive relief, a plaintiff must demonstrate that: (1) the underlying case has some likelihood of success on the merits; (2) no adequate remedy at law exists; and (3) it will suffer irreparable harm without the injunction. *Woods v. Buss*, 496 F.3d 620, 622 (7th Cir. 2007). If the plaintiff establishes those three factors, the district court must then balance the harm to each party and to the public interest from granting or denying the injunction. *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013).

ARGUMENT

I. Plaintiff Can Demonstrate No Likelihood Of Success On the Merits Of Its Claim That The Flavored Tobacco Ordinance Is Preempted By the FSPTCA.

The FSPTCA was enacted in 2009 to grant authority to the Food and Drug Administration (the "FDA") to regulate tobacco products. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 430 (2d Cir. 2013). The FSPTCA contains a section entitled "Tobacco Product Standards," *id.* (citing 21 U.S.C. § 387g(a)(1)(A)), which Plaintiff refers to in its memorandum as the "Special Rule for Cigarettes." That section disallows cigarette flavorings "other than tobacco and menthol," § 387g(a)(1)(A), and grants the FDA authority to establish additional standards for tobacco products, § 387g(a)(4)(B)(i).

Plaintiff argues that the Flavored Tobacco Ordinance is preempted by the FSPTCA because the Ordinance establishes a tobacco standard "different from and in addition to" the standards for flavored tobacco products established by the FDA. Pl.'s Mem. in Supp. of Mot. for

[3] Plaintiff's Amended Complaint also contains two counts alleging violations of federal and state due process. *See* Am. Compl., ECF No. 5.

TRO at 2. Plaintiff argues that because the FSPTCA's "Special Rule for Cigarettes" prohibits the use of "characterizing flavors" other than tobacco or menthol in cigarettes, *id.* (citing 21 U.S.C. § 387g(a)(1)(A)), it preempts the Ordinance's restriction on the *sale* of tobacco products that include menthol and other characterizing flavors. Plaintiff argument, however, misreads the FSPTCA's preemption clause and mischaracterizes the Flavored Tobacco Ordinance.

A. The FSPTCA Does Not Preempt State And Local Regulation Of Tobacco Sales.

In determining whether a state or local law is preempted by a federal law, the Court must assume "that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Grp., Inc. v. Good,* 555 U.S. 70, 76 (2008). "These historic powers include the protection of the health and welfare of the state's citizens." *Nat'l Assoc. of Tobacco Outlets, Inc. v. City of Providence,* 731 F.3d 71, 79 (1st Cir. 2013) (citing *Napier v. Atl. Coast Line R.R.*, 272 U.S. 605, 610 (1926)). If there is any ambiguity as to whether federal and local law may coexist, the local law should be upheld. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). State and local laws may be supplanted by federal law in three ways: express preemption, field preemption, and conflict preemption. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 576-78 (7th Cir. 2012). Where the federal statute contains an express preemption provision, the Court should look first to the wording of that provision. *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

The FSPTCA contains an express preemption provision, included in a section entitled "Preservation of State and Local Authority." 21 U.S.C. § 387p(a). The section consists of three parts. It first provides, in relevant part:

(a) In general

> (1) Preservation
>
> Except as provided in paragraph (2)(A), nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of . . . a State or political subdivision of a State . . . to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure *relating to or prohibiting the sale*, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age . . . .

§ 387p(a)(1) (emphasis added). The "preservation" clause is followed by a "preemption" clause:

> (2) Preemption of certain State and local requirements
>
> (A) In general
>
> No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter *relating to tobacco product standards*, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

§ 387p(a)(2)(A) (emphasis added). The preemption clause is modified by a "saving" clause:

> (B) Exception
>
> Subparagraph (A) *does not apply to requirements relating to the sale*, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products. . . .

§ 387p(a)(2)(B) (emphasis added).

As the language quoted above demonstrates, the FSPTCA's preemption clause prevents states and local governments from establishing requirements related to the list of categories set out in § 387p(a)(2)(A): "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." As stated in the preservation clause, apart from these preempted categories of regulations, "nothing

in" the statute "shall be construed to limit the authority of" a local government to enact "any law, rule, regulation, or other measure with respect to tobacco products." § 387p(a)(1). The preservation clause expressly preserves the traditional power of a local government to adopt measures "relating to or prohibiting the sale" of tobacco products. *Id.*

Not only does the FSPTCA explicitly preserve in § 387p(a)(1) the authority of local governments to regulate, and even prohibit, the sale of tobacco products, the saving clause further provides that even if a local law might otherwise impose requirements falling within the categories listed in the preemption clause, the law is exempt from preemption if it imposes "requirements relating to the sale" of tobacco products. § 387p(a)(2)(B). Thus, even if a local regulation relating to tobacco sales could be construed as related to tobacco product standards, it would be exempt from preemption under the plain language of the saving clause.

These clear limits on the scope of the FSPTCA's preemption clause give lie to Plaintiff's argument that the clause should be construed "broadly" so as to preempt a large swath of state and local tobacco regulations. *See* Pl.'s Mem. in Supp. of Mot. for TRO at 8. Indeed, in its memorandum, Plaintiff actually misquotes the preemption clause so as to eliminate the specific, exclusive list of preempted categories set out in the clause. *See id.* (misquoting § 387p(a)(2)(A) to state that it preempts "requirements 'relating to, *inter alia*, tobacco product standards.'"). It is true that, as Plaintiff argues, the Supreme Court has broadly interpreted the words "relating to" when construing preemption clauses in some federal statutes.[4] *See, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992); *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). But

[4] Plaintiff neglects to mention that the words "relating to" also appear in the saving clause, suggesting that it should be construed just as broadly as the preemption clause. *See* § 387p(a)(2)(B) ("Subparagraph (A) does not apply to requirements relating to the sale . . . of[] tobacco products.").

in the cases on which Plaintiff relies, the Court did not construe statutes in which the scope of federal preemption was as clearly limited and the authority of states and local governments as carefully preserved as in the FSPTCA. *See Morales*, 504 U.S. at 383-84 (explaining that although the Federal Aviation Act contained a "saving" clause preserving existing state remedies, the clause was merely "a relic of the pre-[Airline Deregulation Act]/no pre-emption regime"); *FMC Corp.*, 498 U.S. at 58 (explaining that ERISA's "saving clause returns to the States [only] the power to enforce those state laws that 'regulat[e] insurance'"). Here, in stark contrast to the statutes at issue in *Morales* and *FMC Corporation*, the scope of the FSPTCA's preservation clause is broad, the scope of the preemption clause is carefully limited, the saving clause clearly exempts sales regulations from preemption, and Congress intended these contemporaneously enacted provisions to be read in tandem. *Cf. Morales*, 504 U.S. at 383-84 (describing the FAA's saving clause as a "relic"). By no means was it the "clear and manifest purpose of Congress" to supercede the historic power of local governments to regulate tobacco sales in order to protect the public health and welfare. *Altria Grp., Inc.*, 555 U.S. at 76.

B. The Flavored Tobacco Ordinance Does Not Establish "Tobacco Product Standards."

Plaintiff argues that the FSPTCA preempts the Flavored Tobacco Ordinance because the preemption clause of the federal statute, § 387p(a)(2)(A), forbids local governments from imposing requirements "relating to tobacco product standards." Pl.'s Mem. in Supp. of Mot. for TRO at 8. According to Plaintiff, the Ordinance prohibits the sale of tobacco products that contain menthol, including cigarettes, resulting in local requirements different from the standards set by the FDA. *Id.*

Plaintiff's argument fails because the Ordinance is entirely silent as to "tobacco product

standards." It creates no manufacturing or production requirements, nor does it specify what ingredients cigarettes or other tobacco products may contain. It does not deem any products to be adulterated or misbranded. It merely regulates where certain tobacco products may be sold. As explained in the previous section, the FSPTCA specifically distinguishes between the authority to regulate the *manufacture* of tobacco products (reserved to the federal government pursuant to § 387p(a)(2)(A)) and the authority to regulate their *sale* (preserved by state and local governments pursuant to § 387p(a)(1)).

Plaintiff argues that the Ordinance effectively creates tobacco product standards because it "prohibits" the sale of certain tobacco products. Pl.'s Mem. in Supp. of Mot. for TRO at 13-14. Plaintiff cites two Supreme Court cases holding that complete state bans on the sale or purchase of certain regulated products were preempted by federal law. *See Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012); *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004). But the Flavored Tobacco Ordinance is not a "ban." It restricts the sale of flavored tobacco products only when a retailer is located within 500 feet of a school, and it allows retail tobacco stores to sell the products, even within such proximity to schools. Thus, the Ordinance does not indirectly set standards for tobacco products through a sales ban. Furthermore, sales regulations like the Ordinance are explicitly exempted from preemption by the saving clause.

The cases cited by Plaintiff are, moreover, readily distinguishable. In *National Meat Association*, the Supreme Court held that California's ban on the sale of meat from nonambulatory animals was preempted by the Federal Meat Inspection Act, 21 U.S.C § 601 *et seq.*, which expressly preempts state laws imposing requirements on federally inspected slaughterhouse facilities. The Court reasoned that, although purportedly a ban on sales, the

California sales ban was designed to "implement and enforce" other state-law requirements governing slaughterhouse operations and "function[ed] as a command to slaughterhouses" to comply with those additional requirements. 132 S. Ct. at 972-73. Unlike the state law at issue in *National Meat Association*, the Flavored Tobacco Ordinance does not "command" manufacturers of tobacco products to follow certain manufacturing requirements. It thus does not infringe on the FDA's role in regulating tobacco manufacturing.

Engine Manufacturers Association is also distinguishable. That case held that "fleet rules" set by a California air quality management district were preempted by the Clean Air Act's bar on state "'standard[s] relating to the control of emissions from new motor vehicles,'" even though the state rules imposed purchasing requirements rather than manufacturing standards. 541 U.S. at 254. But, as the Court explained, the federal preemption provision at issue did not distinguish between different types of "standards," and thus applied to manufacturing and purchasing or sales regulations alike. *See id.* The types of "standards" preempted by the FSPTCA, in contrast, are specifically set out in § 387p(a)(2)(A). Furthermore, the Clean Air Act included no saving clause like § 387p(a)(2)(B) that exempted sales requirements from preemption.

In summary, the Flavored Tobacco Ordinance does not impose requirements related to tobacco product standards or any of the other categories of regulations preempted by the FSPTCA. The City's authority to enact and enforce the Ordinance is therefore preserved. And even if the Ordinance could be construed as related to tobacco product standards, it imposes a sales restriction, which the saving clause explicitly exempts from preemption.

C. The First And Second Circuits Have Held That Local Ordinances Restricting Flavored Tobacco Sales Are Not Preempted By The FSPTCA.

The First and Second Circuits have both reached the conclusion that the City advocates here. In *National Association of Tobacco Outlets, Inc. v. City of Providence*, the First Circuit addressed a Providence, Rhode Island, ordinance limiting the sale of flavored tobacco products other than cigarettes to smoking bars. 731 F.3d at 82-83. The court concluded that Providence's ordinance was "a regulation 'relating to' sales specifically allowed by the savings clause, which overrides the standards provision" of the FSPTCA. *Id.* at 82. The ordinance was therefore not preempted. *Id.* The Second Circuit likewise held in *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York* that a similar New York City ordinance was not preempted by the FSPTCA. 708 F.3d at 436. It explained that, although New York's ordinance imposed very strict limitations on the sale of flavored tobacco products, it was "a regulation limiting the businesses at which flavored tobacco may be sold" and thus "establishe[d] a 'requirement[] relating to the sale . . . of . . . tobacco products' within the plain meaning of the saving clause." *Id.*

Plaintiff attempts to distinguish these cases based on the fact that the ordinances enacted by New York City and Providence did not regulate menthol cigarettes, but only restricted the sale of flavored smokeless tobacco products. But the holdings of the two cases did not rely on this distinction. Both Circuits deemed the sales restrictions imposed by Providence and New York City permissible under the FSPTCA's saving clause, which does not distinguish between sales of cigarettes and other tobacco products. The courts rejected the argument that the regulations effectively banned the sale of flavored tobacco products, because they permitted the limited sale of the products in tobacco bars. *U.S. Smokeless Tobacco Mfg.*, 708 F.3d at 435-36; *Nat'l Ass'n of Tobacco Outlets, Inc.*, 731 F.3d at 82. The reasoning of the First and Second

Circuits applies equally to the City's Ordinance, which similarly places restrictions of the sale of flavored tobacco products.

II. Plaintiff Cannot Satisfy The Other Requirements For A TRO.

As explained above, Plaintiff has identified no violation of its rights that could form the basis for injunctive relief. It therefore fails to satisfy the first requirement for a TRO—a likelihood of success on the merits of its claim. *See Woods,* 496 F.3d at 622. Nor can Plaintiff satisfy the other requirements for injunctive relief. Plaintiff cannot establish that it has no adequate remedy at law. *See id.* Although Plaintiff claims that the economic losses its members will suffer under the Ordinance are "too difficult to calculate," Pl.'s Mem. in Supp. of Mot. for TRO at 5-6, it does not explain why lost sales are unquantifiable or why its members could not be compensated by monetary damages, which constitute an adequate remedy at law. *See Meridian Mut. Ins. Co. v. Meridian Ins. Grp.*, 128 F.3d 1111, 1120 (7th Cir. 1997). Nor will Plaintiff's members suffer irreparable harm without the injunction. An injury is "irreparable" for purposes of granting preliminary injunctive relief only if it cannot be remedied through monetary relief at trial. *East St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 703 (7th Cir. 2005). Plaintiff argues that its members will be forced out of business without injunctive relief, but the exhibits submitted by Plaintiff in support of its request for injunctive relief demonstrate that gasoline sales, not tobacco sales, are the primary sources of its members' revenue. *See* Pl.'s Mem. in Supp. of Mot. for TRO Ex. 2 (Abughosh Decl.) ¶ 10, ECF No. 10-3; Ex 3 (Haroon Decl.) ¶ 21, ECF No. 10-7.

Finally, Plaintiff cannot demonstrate that the harm to its members should the injunction be denied outweighs that which would be suffered by the public were it granted. This "equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the

merits, the less heavily the balance of harms must tip in the moving party's favor." *Korte*, 735 F.3d at 665. Here, as Plaintiff fails to show that it is likely to succeed on the merits of its claim, the balance of harms must tilt heavily in its favor to justify relief. It does not. As set out in the preamble to the Flavored Tobacco Ordinance, the City—and the public—have a strong and well-founded interest in attempting to prevent youth smoking by limiting young people's access to menthol cigarettes and other flavored tobacco products that appeal to young smokers, who are profoundly vulnerable to forming a lifelong addiction to products causing cancer, heart disease, pulmonary disease, and myriad other ills. *See* Am. Compl. Ex. A at 1-3. Were the Ordinance enjoined, the City would be denied an important tool to address a serious public health problem.

CONCLUSION

The plain language of the FSPTCA and the persuasive reasoning of two federal circuit courts demonstrate that the Flavored Tobacco Ordinance is not preempted by the FSPTCA. The City therefore respectfully requests that the Court deny Plaintiff's Motion for a Temporary Restraining Order and grant the City such further relief as the Court deems just and appropriate.

Date: November 3, 2014

Respectfully submitted,

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