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

76 ENTERPRISES, INC. KMS PETRO MART, INC. KULDIP SINGH WEST TOWN MOBIL, INC. MAZIN ABAULHUDA, BALWINDER KAUR, and NAVI PETROLEUM USA, INC., On behalf of themselves and others similarly situated, Plaintiffs, v. THE CITY OF CHICAGO, RAHM EMMANUEL, Mayor of the City of Chicago, BECHARA CHOUCAIR, Commissioner of the City of Chicago Department Of Health, and MARIA GUERRA LAPACEK, Commissioner of the City of Chicago Department Of Business Affairs and Consumer Protection, Defendants.	)	Case No.: 14-cv-08306 Judge: Hon. John. J. Tharp, Jr. Magistrate Judge: Hon. Sheila Finnegan

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND EXPEDITED DISCOVERY

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INTRODUCTION AND BACKGROUND

The City of Chicago (the "City") recently enacted ordinance number O2013-9185 (the "Ordinance") and it was adopted by the City Council on December 11, 2013. The Ordinance went into effect on October 7, 2014 with a stated enforcement date of November 7, 2014. The Ordinance imposes a partial ban on the sale of all "flavored tobacco" products, including cigarettes. Chicago Mun. Code § 4-64-098, as amended by Ordinance No. O2013-9185.

Section 4-64-180(b) as amended by the Ordinance states that it shall be unlawful for any person to "sell, give away, barter, exchange, or otherwise deal in flavored tobacco products, samples of such products, or accessories for such products at any location within 500 feet of the property line of any public, private, or parochial elementary, middle, or secondary school located in the City of Chicago." This subsection, however, does not apply to "retail tobacco stores" as defined by Chicago Mun. Code § 7-32-010. See Exhibit 7 hereto.

Section 4-64-180(a) of the Municipal Code, which existed and was enforced prior to the Ordinance, restricts sales of tobacco products within 100 feet of schools. The effect of the Ordinance and Chicago Mun. Code 180(a) is that a gas station or convenience store located within 500 feet of a school would be barred from selling flavored tobacco products, however a retail tobacco store located within 101 feet of a school, and a gas station located greater than 500 feet from a school, would be allowed to sell the same flavored tobacco products. This is patently irrational and unjust.

The Ordinance defines flavored tobacco as any tobacco product that contains a constituent that imparts a "characterizing flavor" as defined in the Ordinance. Chicago Mun. Code § 4-64-098. Menthol is included in the definition of a characterizing flavor. *Id.* The Ordinance also provides that "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.*

The Plaintiffs are owners of gas stations and convenience stores targeted for the new tobacco ban under the Ordinance. If enforcement of the Ordinance is allowed, the Plaintiffs will suffer irreparable harm through the loss of their Constitutional rights, loss of profits, loss of their business goodwill, and loss of market share. Second, the Plaintiffs are likely to succeed on the merits of their constitutional and preemption claims. Third, the Plaintiffs have no other adequate remedy at law. Lastly, the public interest is not served by the enforcement of a patently unconstitutional law. Thus, this Court must grant Plaintiffs a temporary restraining order and a preliminary injunction to stay enforcement of the Ordinance as well as grant Plaintiffs expedited discovery.

ARGUMENT

I. LEGAL STANDARD FOR A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION

To obtain a temporary restraining order or a preliminary injunction, the movant must show that (1) it is reasonably likely to succeed on the merits; (2) no adequate remedy at law exists; (3) it will suffer irreparable harm which, absent injunctive relief, outweighs the harm the respondent will suffer if the injunction is granted; and (4) the injunction will not harm the public interest. Finally, the court, considering all of these factors, is to apply a "sliding scale" approach -- the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position. *Joelner v. Vill. of Washington Park, Illinois*, 378 F.3d 613, 619 (7th Cir. 2004); *Long v. Bd. of Educ., Dist. 128*, 167 F. Supp. 2d. 988, 990 (N.D. Ill. 2001) ("The standards for issuing temporary restraining orders are identical to the standards for preliminary injunctions.") Plaintiffs demonstrate below that they meet each of these requirements.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGES TO THE ORDINANCE.

For reasons discussed below, the Plaintiffs are likely to succeed on the merits of their constitutional and preemption claims to the Ordinance. To succeed in an attempt to preliminarily enjoin a defendant, a plaintiff only must show that it has a "better than negligible" chance of success

on the merits of at least one of its claims. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America Inc*., 549 F.3d 1079, 1096 (7th Cir. 2008); *See also, A. J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903 (7th Cir. 1986). The Plaintiffs have met this burden.

A. The Ordinance Violates the Due Process Clause of the 14th Amendment. The Fourteenth Amendment prohibits states or localities from making or enforcing any law that deprives "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1; *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Here, the Ordinance violates the Due Process Clause as it is unconstitutionally vague; it places an onerous burden on the retailers' right to be heard and; the Ordinance arbitrarily interferes with Plaintiff's vested property rights.

i. The Ordinance is Unconstitutionally Vague.

A statute is unconstitutionally vague as to violate due process if it: "(1) does not provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or (2) fails to provide explicit standards to prevent arbitrary and discriminatory enforcement by those enforcing the statute. *United States v. Plummer*, 581 F.3d 484, 488 (7th Cir. 2009) (citing *United States v. Lim*, 444 F.3d 910, 915 (7th Cir. 2006)). An ordinance "must provide explicit standards" for those who apply them. *Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 498 (1982).

The Ordinance is unconstitutionally vague and standardless for several reasons. First, the Ordinance is unconstitutionally vague as it lacks certainty as to where flavored tobacco can be sold. The Ordinance prohibits the sale of all flavored tobacco by anyone other than a retail tobacco store within 500 feet of any public, private, or parochial elementary, middle or secondary school. The 500 foot barrier is presumably measured from property line to property line, although it is unknown whether the measurement will be as the crow flies, over fences, or along City streets from door to door. Chicago Mun. Code § 4-64-180(b). The Ordinance also does not contain a "grandfather clause" that protects a retail store not prohibited from selling flavored tobacco in the unexpected event that a

school opens up at some time in the future within 500 feet of the store. Since a school could open nearly anywhere in the city, and given the loose application of what is considered a "school", the lack of a grandfathering clause could mean retailers who had been operating legally could suddenly find themselves on the wrong side of the Ordinance if a school opens or acquires property within 500 feet of their property lines, thus interfering with the Plaintiffs' vested rights and contracts contrary to the contracts clause of the United States Constitution. Art. I, §10, cl. 1; *General Motors v. Romein,* 503 U.S. 181, 190 (1982) .

The Plaintiffs have spent hundreds of thousands of dollars in investing their business. *See* Chicago Area Tobacco Retailer's Affidavits at ¶ 4, attached hereto as Exhibits 1, 2, 3 & 4. These business owners would not have spent this money knowing there would be a possibility they could be abruptly banned from selling flavored tobacco if a school unexpected opened within 500 feet of their store. A law that has severe retroactive aspects must be scrutinized carefully in order to determine whether the new law meets "the test of due process…" *General Motors v. Romein,* 503 U.S. 181, 191 (1982). The Ordinance does not contain any standards or guidelines as to what happens in such an instance, and thus this lack of a grandfather clause fails to provide a person of reasonable intelligence notice of where the sale of flavored tobacco is prohibited in the City of Chicago and to which retailers it applies. The Plaintiffs here could legally sell flavored tobacco with the same license they currently have before the Ordinance, but have been discriminatorily, selectively targeted to restrict otherwise legal sales that will now go to their competitors down the street.

Next, the Ordinance is vague and standardless as it leaves uncertain what is the definition of a "school" and which school structures would be counted in determining the 500 foot measurement. For instance, should a school have an athletic field or other facility off its main campus, a person of ordinary intelligence is without notice if the 500 foot ban applies as measured from those structures as well and thus whether the Ordinance is applicable to them. The Ordinance also requires retailers to

have actual knowledge of the location of these property lines are and the ability to measure them with the skill of a land surveyor. See Exhibit 6.

The Ordinance is vague in that it lacks a definition of what is considered a "school." The Ordinance does not limit its application to only schools subject to the Illinois School Code, 105 ILCS 5/1-1, *et seq.* In some instances, the City has deemed a program with three enrollees located in a church as a "school." *See* Exhibit 5 attached hereto and incorporated herein by reference. For just one example, the Philadelphia School of Arts is listed on the City's list of affected businesses. A search of this school located at 3335 West Washington shows it is located in a church and only for students preschool to fourth grade. The school does not report its performance levels and has a negligible enrollment. Similarly, the Robinson Elementary School is for preschoolers to third grade (not a likely target for flavored tobacco sales) and reportedly has only 135 students. The City's list also includes the "Shirley Deer Education and Technology Institute", affecting plaintiff West Town Mobil. This school is a mystery and does not report its performance. See attached Chicago Tribune report on the results of the school performance in Chicago and photos of what the City has deemed to be "schools" attached as Exhibit 8.

As is readily shown, a retail shop that is within 500 feet of any so-called entity that merely calls itself a "school" or is arbitrarily deemed a school by the City would result in that retail shop being prohibited from selling flavored tobacco. The uncertainty of what is considered a "school" under the Ordinance fails to provide proper notice under the Fourteenth Amendment of where the Ordinance is to be implemented.

The Ordinance is also vague as it bans a retailer not only from selling flavored tobacco but also makes it unlawful for a retailer to "otherwise deal in" flavored tobacco. *See* Chicago Mun. Code 4-64-180(b) Exhibit 7. The term "otherwise deal in" is so vague and standardless that a person of normal intelligence could not determine what activities are banned in addition to sales of flavored

tobacco. The term "otherwise deal in" is so broad that it can encompass an unlimited number of legitimate, legal activities and fails to provide notice of what activities are actually banned under the Ordinance.

Lastly, the Ordinance provides that public statements made by or on behalf of a manufacturer that a tobacco product has or produces a "characterizing flavor" is presumptive evidence that a product is banned. *See* Chicago Mun. Code 4-64-098. However, the Ordinance contains no standards concerning how the presumption is to be administered or the manner in which any presumption it creates is to be rebutted. This subjectivity and vagueness violates the protections of the Fourteenth Amendment's Due Process Clause.

ii. The Ordinance Unduly Burdens the Right to Be Heard.

The new Ordinance places an undue burden on the retailers' right to object and obtain a hearing in violation of the Due Process clause of the Fourteenth Amendment. "The essence of due process is notice of a deprivation and an opportunity to be heard in order to prevent, if possible, a wrongful deprivation." *McKenzie v. City of Chicago*, 973 F. Supp. 815, 817 (N.D. Ill. 1997). "'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223 (1863)). The notice and opportunity for a hearing "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The City's "Guidelines for Tobacco Retailers" ("Guidelines"), attached hereto as Exhibit 6 and incorporated herein, outlines the process for contesting a determination that a retailer is within 500 feet of a school. Section 7(b) of the Guidelines requires a written objection to include a plat of survey and report documenting the distance between the property line of the school and the property line of the business. The plat of survey must include not only the property lines of the retail establishment but also the property lines of the school. The objection with the survey is then emailed

to an unnamed City official who then anonymously makes a determination. This process does not meet the due process standards of the 14th Amendment to the United States Constitution as such a hearing would be a "mere formality" *Miller v. Carter,* 547 F.2d 1314, 1315 (7th Cir. 1977).

In addition, plat surveys are extremely expensive and the one as suggested here that includes such a large area would be cost prohibitive. Thus, the objection process acts as a deterrent and unduly burdens and limits the right to object to those property owners with sufficient resources to pay for a plat survey. A cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). Retail owners unable to afford an expensive plat survey or meet these burdensome requirements would not be given a right to be heard under the Guidelines and thus denied their right to object and be heard in violation of their Due Process rights. The procedure provided by the City is a "mere gesture" and does not pass constitutional muster. *Mullane v. Central Hanover Bank & Trust,* 339 U.S. 306, 315 (1950).

Furthermore, Section 7(a) of the Guidelines states: "Written objections concerning whether a particular retail tobacco dealer is subject to the Ordinance will not be accepted from anyone except the retail tobacco dealer itself." This Guideline seemingly disallows representation by counsel in violation of the due process and the right to be heard. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Ala*., 287 U.S. 45, 68-69 (1932).

iii. The Ordinance Arbitrarily Interferes with Plaintiff's Vested Property Rights.

Where a permit has been properly obtained and in reliance theron the permittee has incurred material expense, he acquires a vested property right to the protection of which he is entitled. *Dobbins v. Los Angeles,* 195 U.S. 223, 239 (1904). An ordinance will be held to be void as against

the holder of a permit if there is an arbitrary and discriminatory exercise of police power which amounted to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment. *Id.* This is precisely what will result if the Ordinance is allowed to be enforced.

Here, Plaintiffs have a vested property right in the licenses to engage in the operation of gas stations and the sale of tobacco products as they have incurred great material expenses in reliance of those licenses. *See* Exhibits 1-4 at ¶¶ 2-3. Further, the new Ordinance arbitrarily interferes with this vested property right in violation of the City's police power and the Fourteenth Amendment. The Plaintiffs have been singled out and treated differently than other similarly situated gas stations and retail owners who have arbitrarily been determined by the City to not be within 500 feet of a school. The Ordinance violates the equal protection of the law guaranteed to the Plaintiffs under the Fifth and Fourteenth Amendments to the United States Constitution. *Miller v. Carter,* 547 F.2d 1314, 1315 (7th Cir. 1977)(See below)

In addition, as discussed above, the City does not give a clear definition of what is considered a "school" under the Ordinance. In essence the City is taking the Plaintiff's vested property rights without just compensation. *See Dobbins* at 236-37. In *Dobbins*, the United States Supreme Court held that a local ordinance arbitrarily prevented the plaintiff from constructing a gas line on property she had bought for that very purpose. The Court found that the city council had enacted the ordinance after the plaintiff had begun construction, not in furtherance of the public health or safety, but to provide an economic advantage to another business. *Id.* at 239. The United States Supreme Court stated that "the exercise of the police power is subject to judicial review, and property rights cannot be destroyed by arbitrary enactment… No reasonable explanation for the arbitrary exercise of power in the case is suggested… [W]here… the exercise of the police power [is] in such a manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance." *Id.* at 239-40. In this case, as discussed

below, the City gives no valid rationale for the arbitrary enactment as there is already a ban on the sale of tobacco to anyone under 18 years of age and the Ordinance must be held as invalid.

B. The Ordinance Violates the Equal Protection Clause of the 14th Amendment

The Equal Protection Clause of the United States Constitution commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Equal Protection "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The Fourteenth Amendment "requires that all persons subjected to…legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (Village acted irrationally and arbitrarily by demanding a 33-foot easement for plaintiff but only a 15-foot easement for others).

The standard of review for an equal protection challenge under the Fourteenth Amendment is a "rational basis" review. *Id*. at 442. As the Supreme Court warned, "arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). A law must be ruled unconstitutional if the classification drawn by it is not rationally related to a legitimate state interest. *See Cleburne*, 473 U.S. at 442.

Here, when it comes to a retailer's ability to sell flavored tobacco, not all retailers are treated alike, although they are similarly situated. Retail stores such as gas stations and convenience stores are prohibited from selling flavored tobacco within an arbitrarily selected zone of 500 feet from a school. In contrast, similarly situated stores, would be permitted to sell the same flavored tobacco a nose over 500 feet from a school. Moreover, "retail tobacco stores" as defined by Chicago Mun. Code § 7-32-010 are permitted to sell flavored tobacco within 101 feet of a school. This arbitrary and irrational discrimination allows for some retail shops just over 500 feet from a school to sell flavored

tobacco whereas the same shops within 500 feet from a school would be prohibited from doing so. Likewise, tobacco retail shops within 101 feet from a school could sell and profit from flavored tobacco whereas other retail shops 101 feet from a school would be forbidden to do so. Thus, the City is saying it is acceptable for a tobacco retail store to sell a significant amount of flavored tobacco within 101 feet of a school, but other retail businesses further from the school, and selling a limited amount of flavored tobacco, are outlawed from doing so. The Ordinance violates the equal protection of the law guaranteed to the Plaintiffs under the Fifth and Fourteenth Amendments to the United States Constitution. *Miller v. Carter*, 547 F.2d 1314, 1315 (7th Cir. 1977). The limit of 500 feet from a unilateral determination of a "school" is arbitrary and capricious. *Id.* at 1318. The City Ordinance that distinguishes between a gas station within 500 feet of a school and 501 feet of a school to ban certain sales is "irrational" and therefore violates the Fifth and Fourteenth Amendments to the United States Constitution.

The City does not provide any rational basis for this arbitrary and irrational discrimination among the retailers. The City's apparent rationale for the Ordinance is that the flavored tobacco is more attractive to children and thus by banning it from around schools it will be less accessible and prevent children from using and becoming addicted to tobacco and nicotine. However, this rationale holds no water. First, there is an existing ordinance that prevents the sale of tobacco to minors under eighteen years of age. Moreover, the City's Ordinance presumes that the City's children are ill-equipped or lack the physical capacity to walk one additional inch beyond 500 feet or at most one more City block to be tempted to purchase flavored tobacco products. No rationale exists as to why this extra inch offers a child protection from tobacco. Furthermore, children may not be able to purchase the flavored tobacco at a gas station, convenience store, or other retail shop within 500 feet of a school, however, they could easily walk 101 feet from the school and presumably purchase the same flavored tobacco at a tobacco retail shop. In other words, if a child goes to a retail tobacco store, they have the same access to the flavored tobacco near schools as they did before the

Ordinance was enacted. This unequal treatment of retailers defeats the city's basis for the Ordinance as it does nothing to limit the access of flavored tobacco to children.

Further, the fact remains that the Plaintiffs, and other similarly situated retailers, do not sell cigarettes of any kind to children under 18 years of age based on an existing city Ordinance. Sectional 4-64-190 of the Chicago Municipal Code already protects children from the harms of tobacco. This Section states that "[n]o person shall sell, give away, barter, exchange, or otherwise furnish any tobacco products, tobacco product samples and/or tobacco accessories to any individual who is under 18 years of age." This Section bans sales of *any* tobacco, including flavored tobacco, to individuals under 18 years of age. Retailers can face penalties for violating this ordinance, including the loss of the retailer's tobacco license and fines and penalties under Section 4-64-240 of the Chicago Municipal Code. Thus, the new flavored tobacco Ordinance will have no effect on children under 18 since there are no sales to this group in the first instance. Thus, the city has no rational basis for the unequal treatment of the retailers and the Ordinance must be found unconstitutional.

C. The Ordinance is Preempted by the FSPTCA

The Supremacy Clause of the United States Constitution provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the supreme Law of the Land; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI., cl. 2. Accordingly, state laws that conflict with federal law are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

The Family Smoking Prevention and Tobacco Control Act ("FSPTCA"), Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009), grants authority to the Federal Food and Drug Administration to regulate tobacco products. The FSPTCA preempts any state or local regulation different from, or in addition to, the tobacco product standards promulgated by the FSPTCA is preempted:

> 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 chapter [21 USCS §§ 387 et seq.] relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

21 U.S.C. § 387p(a)(2)(A).

Further, the FSPTCA contains a federal tobacco product standard that prohibits *cigarettes* that "contain, as a constituent…or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice… that is a characterizing flavor of the tobacco product or its smoke," and lists several prohibited examples such as various fruit or candy flavors. *See* 21 U.S.C. § 387g(a)(1)(A) (the "Federal Flavor Standard"). Congress elected to expressly limit this prohibition only to "a cigarette or any of its component parts"- the Federal Flavor Standard does not apply to smokeless tobacco or other non-cigarette tobacco products. *Id.*

Chicago's Ordinance violates the Preemption Clause because it extends the scope of the Federal Flavor Standard to not only cigarettes but to "any tobacco product." Chicago Mun. Code 4-64-098. The Chicago Ordinance further extends the scope of the Federal Flavor Standard to menthol flavored cigarettes, a flavor expressly allowed under 21 U.S.C. § 387g(a)(1)(A). Thus, the Ordinance clearly sets forth a tobacco product standard that is "different from, or in addition to" federal requirements and thus must be preempted and found without effect.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION

Plaintiffs will suffer irreparable harm if the Ordinance is permitted to say in force. Here, Plaintiffs have established a likelihood of success as to a due process and equal protection violation of the Fourteenth Amendment. Courts have held that infringement on a constitutional right "for even minimal periods of time, unquestionably constitutes irreparable injury" sufficient to warrant injunctive relief to avoid such injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Additionally, "[a] continuing violation of constitutional rights constitutes irreparable injury." *Walters v. Thompson*, 615 F. Supp. 330, 341 (N.D. Ill. 1985). Plaintiffs will further suffer irreparable injury from enforcement of an ordinance that violates the Supremacy Clause of the U.S. Constitution because it is

preempted by federal law. See *Morales v. Trans World Airlines, In*c., 504 U.S. 374, 381 (U.S. 1992) (holding that injunctive relief was warranted where local law enforcement officials threatened to apply a state statute in the face of a preemptive federal law).

In addition to constitutional deprivations, the enforcement of the invalid Ordinance will impose economic harm and a loss of market share on the Plaintiffs. The Ordinance will prevent Plaintiff's from selling any flavored tobacco at their convenience store attached to their gas stations. Tobacco sales at these convenience store account for approximately 33% of the store sales. *See* Exhibits 1-4 at ¶ 8. The net profit from gasoline sales averages only about five cents per gallon of gas resulting in monthly net profits from fuel of approximately $2,000.00-$5,000.00 per month. *Id.* Thus, tobacco sales make up a significant amount of the retailer's sales. Without the ability to sell flavored tobacco products, including flavored ones, the retailers will lose business and tobacco sales to competitors outside the 500 foot restriction, even if they are only 1 block further away. *Id.* at ¶ 11. This loss of market share to competitors would be irreparable. *See, Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992); *Illinois Bell Tel. Co. v. MCI Telcoms. Corp*., 1996 U.S. Dist. LEXIS 18337 (D. Ill. 1996) ("Loss of market share is also irreparable injury, because market share is difficult to recover.")

Lastly, the enforcement of this Ordinance and resulting loss of market share will have wide sweeping economic effects. It will place these retailers out of business, lay off employees, and cause them to default on their mortgages. See Exhibits 1-4 at ¶ 12. The property where the businesses are operated will then stand vacant as no other business, besides a gas station, will be viable at these locations and a new gas station dealer will not open in these locations if they cannot sell flavored tobacco. Although the Plaintiffs are suffering mostly economic harm, these harms are irreparable because the City, a governmental entity, is causing the damage, it may prove ultimately impossible for Plaintiffs to recover damages from the City. Many judicial doctrines protect the City from damages awards. Accordingly, courts have held that where the Plaintiff cannot recover damages due

to the defendant's sovereign immunity, any loss of income suffered by a plaintiff is irreparable. *See Cmty. Pharms. of Ind., Inc. v. Ind. Family*, 801 F. Supp. 2d 802, 806 (S.D. Ind. 2011); *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010).

Concomitantly, there is no harm to the municipality of Chicago in being prevented from enforcing an unconstitutional Ordinance. Where a "plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001). Moreover, flavored tobacco is available anywhere just over 500 feet from a school or in a retail tobacco store just over 100 feet from a school.

IV. NO ADEQUATE REMEDY AT LAW EXISTS.

No adequate remedy at law exists for the Plaintiffs. As discussed above, the Plaintiffs will suffer irreparable harm. A conclusion that an injury is irreparable necessarily shows that there is no adequate remedy at law for purposes of injunctive relief. To say that the injury is irreparable means that the methods of repair (remedies at law) are inadequate. *Fleet Wholesale Supply Co. v. Remington Arms Co*., 846 F.2d 1095, 1098 (7th Cir. 1988).

Further, a damages remedy, if even available under sovereign immunity, is inadequate in this instance. First, the damage award may come too late to save the Plaintiffs' businesses. They may become insolvent while waiting for the conclusion of the litigation or have to shut down their businesses. *See Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir. 1984). As Judge Friendly noted in a case involving the termination of an automobile dealer, "the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award." *Semmes Motors, Inc. v. Ford Motor*

Co., 429 F.2d 1197, 1205 (2d Cir. 1970). Similarly, in this instance, the Plaintiffs want to maintain the business of the gas stations and convenience stores, not live on a damages award.

Lastly, the Plaintiff's loss of market share and profits may be too difficult to calculate. It may be difficult to distinguish the effect of the Ordinance on market share and profits from the effect of other things happening at the same time, and to project that effect into the distant future. *See Roland Machinery*, 749 F.2d at 386 (discussing the inadequacy of a damages remedy due to the difficulty in calculating damages).

V. THERE WILL BE NO HARM TO THE PUBLIC INTEREST

In granting the injunction, there will be no harm to the public interest. Conversely, granting the injunction will serve the public interest. Here, the constitutional rights of the Plaintiffs are at stake which serve the public interest. "[I]t is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). "Surely, upholding constitutional rights serves the public interest." *Joelner v. Village of Wash. Park*, 378 F.3d 613, 620 (7th Cir. Ill. 2004) (quoting, *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003)). Moreover, the same access to flavored tobacco will exist after the Ordinance as before. The Ordinance serves no purpose other than to shift the Plaintiffs' hard earned business interests to their competitors.

In summary, Plaintiffs here are entitled to a Temporary Restraining Order and a Preliminary Injunction preventing the enforcement of the Ordinance.

EXPEDITED DISCOVERY

Plaintiff are requesting expedited discovery. Fed. R. Civ. P. 26(d) (1) gives the Court authority to order expedited discovery. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000). Fed. R. Civ. P. 26(d) allows for discovery before the parties have conferred, as required by Fed. R. Civ. P. 26(f), when authorized by a court order. A court has

wide discretion in managing the discovery process. *Id.* In this case, expedited discovery is necessary to properly prepare for the hearing on this matter.

CONCLUSION

WHEREFORE, the Plaintiffs request this Court to enter an order granting a temporary restraining order and a preliminary injunction enjoining and restraining the Defendants from enforcing Chicago ordinance O2013-9185 and for expedited discovery.

Respectfully submitted,

76 ENTERPRISES, INC., KMS PETRO MART, INC., KULDIP SINGH, WEST TOWN MOBIL, INC., MAZIN ABAULHUDA, NAVI PETROLEUM USA, INC., AND BALWINDER KAUR

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