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

MISSOURI PET BREEDERS ASSOCIATION, *et. al.*,	)	
Plaintiffs,	)	
v.	)	Case No.: 2014 CV 6930
	)	Hon. Matthew F. Kennelly
COUNTY OF COOK, *et. al.*,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO THE MOTION TO DISMISS

Introduction

The Companion Animal and Consumer Protection Ordinance ("Ordinance") bans Cook County Pet Shops from purchasing animals from almost all breeders. Without question, this Ordinance will put the Pet Shops[1]--which have collectively been in business more than 50 years--out of business and cause financial ruin to their owners.

Recently, a District Court entered a preliminary injunction when the City of Phoenix enacted a similar ordinance (*Puppies 'N Love v. City of Phoenix*, 2014 WL 1329296 (D. Ariz. Apr. 2, 2014)) (Exhibit A) and before then against El Paso, Texas for its puppy ordinance. *Six Kingdoms Enterprises, LLC v. City of El Paso, Tex.*, 2011 WL 65864 (W.D. Tex. Jan. 10, 2011) (Exhibit B). The District Courts found serious questions were raised as to the constitutionality of the proposed ordinances. Likewise, the Amended Complaint clearly raises, at least, plausible claims as to the constitutionality of the Ordinance that cannot be resolved on a motion to dismiss. As such, the Defendants' Motion must be denied.

[1] "Pet Shops" refers to the pet store plaintiffs Starfish Ventures, Inc. ("Petland of Hoffman Estates"), Happiness Is Pets Of Arlington Heights, Inc. ("Happiness"), and J & J Management, Inc. ("Petland of Chicago Ridge").

Facts

A. The Plaintiffs: The Pet Shop plaintiffs are three small family-operated businesses who have been in business for a combined half-century without a violation associated with the sale of dogs, cats, or rabbits. Plaintiff Missouri Pet Breeders Association's ("MPBA") members will be affected and injured because they cannot sell animals to Cook County pet shops. (Amended Complaint ("Comp.") ¶¶ 9-15; 23-30)

B. The Ordinance: Cook County passed the Ordinance within 6 days of when it was first considered--without a legal review. Commissioner Schneider explained, "I have never seen an issue before this Board where [we handled an ordinance this way] . . . I am a little puzzled by how we proceeded today." The procedure was so abrupt that safeguards were enacted the following month to avoid another ordinance being passed without proper committee consideration. (Comp. ¶¶ 35-39)

1. The Ordinance's Impact On Interstate Commerce. The Ordinance's sponsor stated on the Record in advocating in favor of its passing that: "[t]he only thing that we can do to impact breeders from out of state is to try to affect regulations that would keep people from selling dogs from breeders from out of state here." Indeed, 98% of USDA licensed breeders are outside of Illinois and the Pet Shops obtain between 98.71% and 100% of their animals from outside of Illinois. (Comp. ¶¶ 45-47)

There are hundreds (at least) of unlicensed animal breeders located in the state of Illinois who benefit dramatically under the Ordinance because: (a) they can directly sell their animals to consumers and (b) the nature of animal sales is such that being physically present is critical for sales to occur. (Comp. ¶¶ 6, 45, 49, 50, 55, 76, 80; Exhibit G to Motion for TRO at ¶ 16). Due to the importance of face-to-face contact in the sale of

animals, if out of state breeders want to continue to sell directly into Cook County they will have to have a physical presence locally, become licensed, and spend hundreds of thousands of dollars on facilities. (Exhibit J to Motion for TRO). Puppy, rabbit, and kitten purchasers often want to play, touch, and cuddle with an animal prior to making a purchase which underscores the importance of a local market presence; in fact, the USDA has underscored the importance of "face-to-face" contact in the sale of an animal:

> **The buyer, seller, and the pet available for sale must all be physically present at the time of purchase or before taking custody of the animal in order to meet the definition of a "face-to-face" transaction and remain exempt from licensing. Photos, webcam images, Skype sessions or other electronic means of communication are not a substitute for the buyer or their designee personally observing the animal**. (Comp. ¶ 50)[2] (emphasis added)

2. The Ordinance Cuts Off The Interstate Animal Supply Pipeline. The Ordinance prohibits the Pet Shops from purchasing animals from dealers/breeders with a USDA Class "B" license, *i.e.,* the transport providers for out of state animals coming into Illinois. Subpart B, 9 CFR § 2.25. Class B license holders are a pipeline that allows pet stores to get out of state inventory. The Ordinance's elimination of sourcing from Class B licensees has effectively shut off Cook County pet shops from obtaining animals in interstate commerce. (Comp. ¶¶ 42, 51; Exhibit F ¶ 9 to Motion for TRO)

3. The Ordinance Is A De Facto Ban Against Out Of State Breeders. The Ordinance bans 96% of the USDA breeding facilities in states surrounding Illinois from sourcing to the Pet Shops. Allowing for sales from a USDA Class "A" licensee with 5 or fewer females is almost an impossible standard to meet. Breeders with 4 or fewer animals do not need a license (9 CFR § 2.1(a)(3)(iii)) so virtually no breeders with

[2] The Humane Society and EBay recommend as part of their "Responsible Pet Acquisition, Ownership & Adoption" guidelines to buy animals from "sellers who live in your area" and cautions against purchases involving "long distances". http://info.ebayclassifieds.com/About_us/responsiblepetownership.html. Approximately 98% of the Pet Shops' sales are estimated to be from local Illinois consumers.

less than 5 animals have a license. The Ordinance bans the sale of puppies from a breeder who has 6 or more breedable female animals. As such, practically speaking, *the only breeder who would qualify to sell would be one that had a USDA A license and exactly 5 female animals, no more and no less*. (Comp. ¶¶ 41-42)

While the Ordinance eliminates almost all out of state breeders, it will allow Illinois' hundreds of *unlicensed* breeders to continue to sell animals in Cook County directly to consumers (but not through the Pet Shops) since they are physically located in Illinois (as explained above, face-to-face contact is crucial). (Comp. ¶¶ 48-49, 55) In-state breeders will serve to be the exclusive source for breeder-provided dogs and the Pet Shops will only have a sporadic supply insufficient to meet local demands which will in turn increase consumer pricing. (Comp. ¶¶ 50, 56; Motion for TRO at Ex. F, ¶¶ 20-21) It is not economically feasible for out of state breeders to establish a local presence; doing so would cost hundreds of thousand dollars and most breeders live on modest incomes.[3]

4. Contractual Impairment. The Pet Shops have entered into thousands of warranties/contracts that they cannot honor under the Ordinance. While they have promised consumers "a replacement puppy of equal value" if an animal is not healthy for years into the future (Illinois law requires this, 225 ILCS 605/3.15(g)) shelter animals are not of equal monetary value as the pure bred animals. The Pet Shops would not be able to source animals that comply with their thousands of warranties and Illinois law. (Comp. ¶ 63). The Pet Shops also would violate supply agreements, leases, and franchise agreements that are detailed in the Amended Complaint. (Comp. ¶¶ 64-65)

[3] *See* Exhibit J to Plaintiffs' Motion for TRO. Furthermore, USDA statistics show that over 85% of Class A breeders' gross annual income is less than $50,000; insufficient to warrant establishing a local presence.

ARGUMENT

I. MPBA Has Standing.

Defendants argue (Motion, pp. 5-8) that MPBA lacks standing. MPBA has standing because the Ordinance denies its members access to an important marketplace--Cook County pet shops. MPBA ensures that its members may export animals into other states and advocates on their behalf. While its members sell animals to Cook County pet stores, the Ordinance precludes them from being an available source. (Comp. ¶¶ 9, 22)

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977), held that an association has standing to sue on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members. *Id.* at 343. Factually, *Hunt* is similar to this case. Just as the North Carolina statute requiring Washington apple growers to remove Washington state grades from containers selling into the North Carolina market had been a significant cost which reduced the efficiency of these sellers' market operations or caused them to lose accounts, *Id.* at 343-44, MBPA's breeders would have to incur prohibitive expenses for continued access to the Cook County marketplace. (Comp. ¶ 50) As in *Hunt*, where the injuries sustained were "central to the Commission's purpose of protecting and enhancing the market for Washington apples," *Hunt*, 432 U.S. at 344, the injuries facing Missouri's breeders are central to MPBA's goals of ensuring that its members can export animals outside Missouri and into other states. (Comp. ¶ 22) *See also Northeastern Fla. Ch., Assoc. Gen. Contractors v. City of*

Jacksonville, 508 U.S. 656 (1993) (standing exists if members are prevented from engaging in a market on an equal basis).

In *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 594-95 (7th Cir. 1995), the Plaintiff, a Virginia trade association, had done business with Illinois utilities. The association challenged an Illinois law that interfered with the sales of its members. The Court recognized that the *ideal* plaintiff is an out of state association whose members are denied access to an in-state marketplace. *See Id.* at 595 ("it is difficult to imagine more appropriate plaintiffs to challenge the constitutionality of the Illinois Act"). *Alliance* rejected the notion that standing requires an association to show that any of its members have actually been denied access to the marketplace as a result of the law. *Id.* at 594.

Likewise for the second *Hunt* prong, MPBA has clearly stated its purpose as the nation's oldest and largest professional pet organization that "advocate[s] for the interests of its members." (Comp. ¶ 9) The Ordinance is germane to its purpose because its members "will be affected and injured if the Ordinance is upheld because they will be deprived of the right to continue the sale of [animals] to pet shops in Cook County". *Id.*

MPBA also meets the third *Hunt* element because it seeks an injunction. *Hunt*, 432 U.S. at 344; *Org. of Minority Vendors, Inc. v. Illinois Cent. Gulf R.R.*, 579 F. Supp. 574, 590 (N.D. Ill. 1983) (corporate plaintiffs had standing to maintain the action in all respects; association for injunctive relief). Declaratory relief is especially apt if an association seeks prospective relief. *Nat'l Ass'n of Prof'l Allstate Agents v. Allstate Ins. Co.*, 2002 WL 34940469, at *5 (M.D. Fla. Apr. 22, 2002).

The Defendants' cases are not applicable. *Am. Canine Found. v. Sun*, 2007 WL 4208358 (N.D. Cal. Nov. 27, 2007) concerned an association challenging a neutering law

impacting all dogs in Los Angeles County with certain exceptions, while the applicable Ordinance is limited to pet shops. MPBA members do not have to reside in Cook County; by selling into the applicable market they are "harmed by the law." *Id*. at 3 (internal citations omitted). *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998), does not support the Defendants. That organization did not meet the third *Hunt* prong because establishing the alleged injuries--individual members' humiliation, job loss, arrests, and being told that they were not Irish--required the participation of individual members. *Id*. at 649. *Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs*, 708 F.3d 921 (7th Cir. 2013), is inapplicable because the member on whose behalf the association sued mooted the case by signing a settlement. *Id*. at 925-26. The Court did explain, however, that "prospective injury, such as the threat of enforcement, can indeed present a cognizable injury-in-fact." *Id*. at 928. *Mainstreet Org. of Realtors v. Calumet City, Ill.*, 505 F.3d 742 (7th Cir. 2007), is not applicable because the Court found that the claim did not relate to the rights of the association's members (realtors) but rather to the rights of property owners, unlike here. *Ouellette v. Mills*, 2014 WL 1975438 (D. Me. May 15, 2014), is inapplicable because the challenge was raised against a statute that did not in practical effect prevent out of state sellers from selling into the state; it allowed foreign sources to sell into the state. Defendants' main cases (unlike *Alliance* and *Hunt*) do not involve associations whose members were being deprived of the right to sell into a market, or when a law discriminated against out of state citizens.

III. The Amended Complaint States A Plausible Commerce Clause Claim.

The Defendants argue (Motion, pp. 10-15) that the Ordinance does not violate the Commerce Clause. Plaintiffs at this stage need only demonstrate a *plausible* Commerce

Clause violation. *See Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir. 1992) (reversing in challenge to law imposing evenhanded ban on game animals because evidence was ignored about impact on interstate commerce and less burdensome alternatives); *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 95 (2d Cir. 2009) (reversing dismissal of Commerce Clause claim because for purposes of a motion to dismiss, claim was plausible).[4] Based upon a similar Commerce Clause argument, *Puppies 'N Love* found that the "Commerce Clause argument, although vigorously disputed, presents an issue worthy of factual development and the Court's careful consideration." *Puppies 'N Love,* 2014 WL 1329296 at *4. *Six Kingdoms Enterprises* found that "the ordinance plainly has a discriminatory impact upon out-of-state interests". *Six Kingdoms Enterprises*, 2011 WL 65864 at *8.

The first step in a Commerce Clause analysis is to determine "whether a challenged law discriminates against interstate commerce." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). "A discriminatory law is 'virtually *per se* invalid,' and will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 338. If the law is not discriminatory, then the issue is whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 338-39. This Ordinance fails both tests.

A. The Ordinance Is *Per Se* Invalid. The Ordinance discriminates on its face. A "Pound" located outside Illinois is a prohibited source of animals; one inside of

[4] *PPL Energyplus, LLC v. Nazarian*, 2012 WL 4092952 (D. Md. Aug. 3, 2012) (plausible Commerce Claim alleged under motion to dismiss standard); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 910 (N.D. Ohio 2010), *aff'd*, 705 F.3d 588 (6th Cir. 2013) (Commerce Clause claim met "plausibility" standard).

Illinois is a permitted source. The Ordinance defines "Pound" as one "licensed by the Illinois Department of Agriculture and approved by the Administration . . . and used as a shelter for seized, stray, homeless, abandoned or unwanted animals." To be so "licensed" it is necessary to operate *inside* the state of Illinois. *See* 225 ILCS 605/3 (requiring a license to operate "in this State").[5] As the Ordinance discriminates against interstate commerce on its face, it is *per se* invalid. *Dep't of Revenue of Ky.*, 553 U.S. at 338.

The Defendants assert that the Plaintiffs are not out of state Pounds (Motion, p. 10). This misses the point: the Plaintiffs are challenging the Ordinance because on its face it prohibits sourcing animals from out of state Pounds--as defined. The Defendants also argue that the Ordinance specifically allows the Pet Shops to obtain animals from a host of facilities operated by governmental bodies. The Defendants' assertion that the Pet Shops can obtain their animals from all out of state Pounds is not accurate because this assumes falsely that all Pounds are operated by a governmental entities; they are not.

B. The Ordinance Burdens Interstate Commerce. The Ordinance also violates the Commerce Clause because it deprives out of state breeders like MPBA's members from having access to the Cook County marketplace and interferes with the ability of the Pet Shops from having access to out of state animals. The Supreme Court has routinely struck down even facially neutral laws that have the effect of altering the market such that "[o]ut-of-state [producers] are deprived of access to local demand for their services" and thereby "hoard a local resource -- be it meat, shrimp, or milk [or, here,

[5] *See also Avery v. State Farm Mut. Auto. Ins. Co.,* 216 Ill. 2d 100, 185 (2005) (statutes have no extraterritorial effect "unless an intent to do so is clearly expressed"). The Animal Control Act defines "pound" interchangeably with "animal control facility" and utilizes the same definition as the Ordinance: "any facility approved by the Administrator for the purpose of enforcing this Act and used as a shelter for seized, stray, homeless, abandoned, or unwanted dogs or other animals." 510 ILCS 5/2.18. There is not even a place on the state license application to put in a state in the address field since it is assumed that all such facilities are inside Illinois. http://www.agr.state.il.us/Forms/AnimalHW/AW-1.pdf

animals] -- for the benefit of local businesses that treat it." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994). Advantaging of local market participants at the expense of out of staters is classic unconstitutional conduct. *See City of Phila. v. New Jersey*, 437 U.S. 617 (1978).

Facially neutral restrictions that have the effect of burdening out of state suppliers are routinely held unconstitutional. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 367-68 (1992); *C & A Carbone, Inc.,* 511 U.S. at 391 (law is no less discriminatory because in-state or in-town processors are also covered by the prohibition); *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844 (N.D. Ill. 2000). A locality may not "burden[] the flow of interstate commerce by restricting access of out-of-state suppliers to local markets." *La. Dairy Stab. Bd. v. Diary Fresh Corp.*, 631 F.2d 67, 69 (5th Cir. 1980).

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), held that forcing a grower of cantaloupes to open a facility in another state at a substantial cost constituted an unlawful burden upon interstate commerce. Like the growers in *Pike*, from a practical perspective out of state breeders must establish a presence in Cook County to compete fairly. In *Family Winemakers of Calif. v. Jenkins,* 592 F.3d 1 (1st Cir. 2010), a law that allowed "small" wineries (those producing less than 30,000 gallons of wine) to distribute wine in the state in multiple ways but restricted large wineries to either select direct sales or wholesalers was unconstitutional. Although facially neutral, by distinguishing between the large and small wineries, the ordinance discriminated against 98% of the country's wine and also allowed the in-state wineries to sell since they were all small. The First Circuit found that the law "significantly burdens out-of-state competitors", *Id.* at 5, and

rejected that this favored out of state participants since most of the small wineries were located out of state. *Id*. at 10-11 (when "the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market" the regulation is suspect, *Id*. at 10). As such, and as applies here, the Court held that its "effect is to significantly alter the terms of competition between in-state and out-of-state [breeders] to the detriment of the out-of-state [breeders] that produce 98 percent of the country's [animals]." *Id*. at 11. *See also Baude v*. *Heath*, 538 F.3d 608, 611-15 (7th Cir. 2008) ("[t]he statute is neutral in terms, but in effect it forbids interstate shipments direct to Indiana's consumers, while allowing intrastate shipments", *Id*. at 612, because 93% of all wine comes from states that do not qualify under Indiana's laws); *Hunt*, 432 U.S. at 351 (law came into "conflict with the Commerce Clause's overriding requirement of a national "common market,'"); *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992).

Although not cited by the Defendants, *Nat'l Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1132 (7th Cir. 1995), found *constitutional* an ordinance prohibiting spray paint sales in Chicago. Judge Easterbrook stated that "to determine whether there is a disparate effect on interstate commerce, then, we need to know what consumers will replace spray paint with. A dispute between the parties on this subject might require a district court to activate its fact-finding apparatus [under *Pike*]". He easily disposed of the Commerce Clause argument because "plaintiffs did not offer any evidence" relating to the impact on interstate commerce at trial. *Id.* at 1132. Judge Rovner, concurring, pointed out that if a "facially neutral ordinance" applies, "the district court may conduct evidentiary proceedings and even a trial to test the actual benefits and

burdens of the legislation, regardless of what a reasonable legislator may have believed". *Id.* at 1134. Ultimately, however, "because plaintiffs never alleged that Chicago's ordinance discriminates against interstate commerce in any way, *Pike* was never activated, and a trial was therefore unnecessary." *Id*. Unlike *Nat'l Paint*, a substantial impact on interstate commerce is alleged here that cannot be resolved on a motion to dismiss. For example: (a) 98% of breeders (those outside Illinois) lose their access to the local marketplace and (b) will be replaced as the source of breeder-raised animals by Illinois' hundreds of local breeders who have access to the market since they are physically located inside Illinois and the Ordinance does not prohibit them from selling directly to consumers. (Comp. ¶¶ 6, 45, 49, 55, 76, 80)

Given the importance of face-to-face sales in this marketplace and the elimination of Class B breeders to import, the Ordinance greatly burdens interstate commerce. Here, as in *Boude* and *Family Winemakers,* almost all of America's breeders have lost access to Cook County unless they are willing to establish a physical presence in the county. You cannot order an animal through the mail and Cook County residents will not typically travel into other states to purchase an animal particularly when there are hundreds of local breeders who can sell directly to them. Out of state producers have no local forum in which to sell their animals, so every customer that does not want to mail or Internet-order an animal, or drive to another state to buy one, is compelled to buy from the local producer. As such, this case is similar to *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951), in which an importer and distributer of out of state milk challenged a city ordinance that made it unlawful to sell any milk as pasteurized unless it had been processed at a plant in the city. This was unlawful because it "in practical effect excludes

from distribution in Madison wholesome milk produced and pasteurized in Illinois [by] erecting an economic barrier." *Id.*

More importantly, in their rush to pass the Ordinance, the Defendants did not even try "reasonable nondiscriminatory alternatives." *Dep't of Revenue of Ky.*, 553 U.S. at 338. A ready alternative would be to do what every government does: regulate. It would be feasible, for example, for a pet shop to sell animals purchased only from breeders with no direct USDA violations, or to require more disclosure like Orland Park and the State of Illinois recently did.[6] A tiny portion of shelter animals originate from pet stores and the Ordinance will put the Pet Shops out of business so alternatives were warranted. (Comp. ¶ 66-71)

Next, the Defendants argue that the "savings clause" in the Animal Welfare Act (AWA), 7 U.S.C. § 2143(a)(8), allows the County's Ordinance (Motion, p. 11). 7 U.S.C. § 2143(a)(8)'s language that it "shall not prohibit [local government] from promulgating standards in addition to those standards promulgated by the Secretary" does not allow interstate commerce interference for two reasons. ***First***, 7 U.S.C. § 2143(a)(8) must be read in conjunction with 7 USC § 2131 which states that the AWA is necessary to prevent and eliminate burdens upon [the free flow of] commerce and to effectively regulate such commerce . . .". The prohibition of regulated animal transporters (Class B licensees), not allowing USDA license holders to nationwide benefits of their licenses, and prohibiting consumers from buying animals at their local pet shop that were humanely treated in accordance with AWA regulations when they crossed state lines burdens instate commerce's free flow.

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[6] http://www.chicagotribune.com/suburbs/orland-park-homer-glen/ct-orland-puppy-mills-tl-ssw-0918-20140917-story.html *See also* P.A. 98-593, 225 ILCS 605/3.15

Second, 7 U.S.C. § 2143(a)(8) does not "clearly" allow Commerce Clause violations. To be removed from the reach of the dormant Commerce Clause, congressional intent must be "unmistakably clear." *South–Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 91 (1984). To authorize a Commerce Clause violation, Congress must do more than simply authorize a State to regulate in an area, it must "affirmatively contemplate otherwise invalid state legislation," *Id.,* and clearly express its intent to "remove federal Constitutional constraints." *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 960 (1982). The Defendants bear the burden of "demonstrating [this] clear and unambiguous intent." *Wyoming v. Oklahoma,* 502 U.S. 437, 458 (1992); *Rocky Mount. Farm. Union v. Goldstene*, 843 F. Supp. 2d 1042, 1069 (E.D. Cal. 2011); *City of Los Angeles v. Cnty. of Kern*, 462 F. Supp. 2d 1105, 1113 (C.D. Cal. 2006) ("Approval for local regulation in general does not constitute express approval for discriminatory regulation."). 7 U.S.C. § 2143(a)(8) does not come close to this standard.

i. The Ordinance Was Designed To Affect Out Of State Lawful Activity. As an additional basis to strike down the Ordinance, it was specifically designed to regulate conduct outside of Illinois as its sponsor proclaimed it was trying to "impact breeders from out of state". (Comp. ¶¶ 45-47). A statutory provision which, by design, directly regulates extraterritorial activity is *per se* invalid. *Midwest Title Loans, Inc. v. Ripley*, 616 F.Supp.2d 897, 903 (S.D. Ind. 2009); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 (1996) (it is not appropriate to create local laws with the intent to change conduct that is lawful in other states or "to deter conduct that is lawful in other jurisdictions."). *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), held that:

> Massachusetts is attempting to regulate conduct beyond its borders and beyond the borders of this country. In the domestic Commerce Clause arena, the Supreme

> Court has held that "one State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce but is also constrained by the need to respect the interests of other States," and that "it follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws ***with the intent of changing . . . lawful conduct in other States.***" *Id*. at 69 (emphasis added).

The Defendants' cases are inapplicable. *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008 (9th Cir. 1994), was decided on summary judgment after the plaintiff failed to present "evidence that these effects are of a type or an extent that could support a determination that they are "clearly excessive" in relation to the state's interest". *Id*. at 1015. The Plaintiffs, here, are entitled to have an opportunity to present evidence; this case cannot be resolved on a motion to dismiss. *Natl. Solid Waste Man. Assoc. v. Granholm*, 344 F. Supp. 2d 559 (E.D. Mich. 2004), held that the applicable law's discriminatory *effect* remained "an open question" because no procedures for implementation had been established and "no jurisdiction outside of Michigan is required to conform to Michigan law". *Id*. at 566. Here, out of state breeders would have to conform to the Ordinance's nearly impossible standards to sell to local pet shops. As to discriminatory intent, the statements at issue in that case involved statements made by legislators to the media and the defendants argued that legislative purpose was better discerned by the legislators' own words regarding their purpose. *Id*. Here, the statements relied upon as to intent were made during the official session on the Record.

Zimmerman v. Wolff, 622 F. Supp. 2d 240 (E.D. Pa. 2008), is very different from this case. Unlike the Plaintiffs here who have never had an animal welfare violation, that plaintiff lost his state kennel license because he was convicted of animal cruelty. *Id*. at 242. He alleged the obviously incorrect assertion that his denial of a state license prevented him from operating in interstate commerce despite his animal cruelty

conviction. *Id*. at 246. *Zimmerman* itself points out that a law cannot discriminate against out of state commerce or unduly burden it, *Id*. at 245, and as explained above to be removed "from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South–Central Timber,* 467 U.S. at 91.

DeHart v. Town of Austin, 39 F. 3d 718 (7th Cir. 1994), is also a very different case. It upheld (via summary judgment, not a motion to dismiss as here) an ordinance regulating wild or dangerous animals because the law did not excessively burden interstate commerce in relation to its putative local benefits. "No evidence was presented by DeHart on summary judgment that created a material issue of fact as to whether this local interest could be advanced through less burdensome alternatives." *Id*. at 724. The Plaintiffs here have stated a plausible claim and are entitled to provide evidence to back it up at trial. *Am. Canine Found. v. Sun*, 2007 WL 4208358, at *1 (N.D. Cal. Nov. 27, 2007), is also misdirected as that ordinance required all dogs to be spayed and neutered, with certain exceptions. The Court found that there was no significant burden on interstate trade because an out of state owner simply had to obtain an unaltered dog license to be permitted to breed, sale or show in the county. *Id*. at *9. Out of state breeders who want to sell in Cook County would have to undergo extreme changes in their business practices and licensing requirements. *Illinois Rest. Ass'n v. City of Chicago*, 492 F. Supp. 2d 891 (N.D. Ill. 2007), has no precedential value because the Seventh Circuit "remanded with directions to vacate the underlying order *in its entirety*", 2008 WL 8915042 (N.D. Ill. Aug. 7, 2008) (emphasis added). Even if considered, the District Court itself recognized that it was "in tension with other Supreme Court and Seventh Circuit cases". *Illinois Rest. Ass'n* 492 F. Supp. 2d at 904. Finally, from a

factual standpoint, it is distinguishable because the Court pointed out that *no* foie gras is produced in Illinois. *Id*. at 903-904. As a result, in-state interests were not favored. On other hand, in-state breeders' physical presence in Cook County allows them to sell animals directly and consumers will "turn to Illinois-produced substitutes" which did not apply in the case of *Illinois Rest. Ass'n*. *Id*. at 903. Finally, in *Fortuna's Cab Service, Inc. v. Camden,* 269 F. Supp. 2d 562 (D.C. N. J. 2003), the plaintiff did not even allege a Commerce Clause violation. The Court addressed in two paragraphs that interstate commerce was not implicated in the case. *Id*. at 565-66.

C. The Foreign Commerce Clause Violation. The Ordinance violates the Foreign Commerce Clause (U.S. Const. art. I, § 8, cl. 3) for two reasons:

First, the Ordinance facially discriminates against foreign sourced animals. The Pet Shops may purchase from a select few American breeders (small USDA Class A licensees), but all foreign sourced animals are prohibited because their breeders would not have a USDA Class A license. *See* Subpart A, 9 CFR § 2.1 providing that Class A license holders obtain a license from the "State" in which they operate which is defined as a state or territory of the United States. *Id*. at § 1.1. ***Second***, the federal government highly regulates the importation of animals from foreign sources.[7] For example, under § 2.150 and § 2.151 of the Rule on the Importation of Live Dogs, which was created to implement a 2008 amendment to the AWA to ensure the welfare of imported dogs, live dogs may be "imported for resale" into the United States if they are in good health, have received all necessary vaccinations, and are at least 6 months of age. Nowhere in the

[7] https://www.federalregister.gov/articles/2014/08/18/2014-19515/animal-welfare-importation-of-live-dogs#h-24

Rule is it stated that a local government arm may create an ordinance that prevents the sale of imported animals into its market if allowed under federal law.

Laws that allow discrimination against foreign commerce are invalid. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 67 (1st Cir. 1999) (law restricting state agencies from purchasing goods from companies that do business with a particular country invalid); *Nat'l Foreign Trade Council, Inc. v. Giannoulias*, 523 F. Supp. 2d 731, 747 (N.D. Ill. 2007) (Kennelly, J.) ("regulations that facially discriminate against foreign commerce are *per se* invalid."); *ABC Charters, Inc. v. Bronson,* 591 F. Supp. 2d 1272, 1296 (S.D. Fla. 2008); *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 79 (1992) (law that treated dividends received from foreign subsidiaries less favorably than those received from domestic subsidiaries facially discriminated against foreign commerce in violation of the foreign commerce clause because "preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination.").

As the Ordinance discriminates by only allowing animals sourced from domestic breeders, and the federal government explicitly allows importation of foreign animals, the Ordinance violates U.S. Const. art. I, § 8, cl. 3.

IV. Plaintiffs Have Stated Plausible Equal Protection Claims.

The Ordinance violates the Plaintiffs' right to equal protection, U.S. Const. Amend. XIV, and of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2) because it: (a) prohibits Pet Shops from selling animals that others (i.e., breeders and not for profits) are permitted to sell, (b) practically prohibits out of state breeders from selling dogs in Illinois through pet shops when the same practice is permitted by in-state

breeders doing it directly, and (c) allows certain Class A breeders to sell but prohibits all Class B breeders and foreign breeders. *Six Kingdoms* found that while reducing stray animals is a respectable goal that it would not second guess, it held that:

> "the Court is concerned [that] the ordinance gives special treatment to animal welfare organizations at the expense of retail establishments, in the form of privileges granted the former and burdens placed on the latter. This is uncomfortably close to the exact issue the Supreme Court has cautioned courts to investigate, that is, a legislative body acting to benefit one group of special interests at the expense of another." *Six Kingdoms Enterprises* at *6.

While rational basis review is generally deferential, "the standard is not a toothless one." *Illinois Sport. Goods Ass'n v. Cnty. of Cook*, 845 F. Supp. 582, 590 (N.D. Ill. 1994). Rather, "even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be obtained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). In *Illinois Sporting Goods*, the challenged ordinance regulated certain gun stores but not others. The plaintiffs alleged the ordinance classifications were under-inclusive in that they allowed certain businesses (i.e. large chains, pawn shops, and firearm dealers who owned their own stores) to continue to sell guns but excluded others (certain gun stores) from doing so. Judge Holderman held that: "The County has arbitrarily and irrationally excluded certain businesses that sell guns" but not others. *Illinois Sporting Goods*, 845 F. Supp. at 591.[8] In the same way, Cook County cannot establish that it is "necessarily or universally true that all [pet shops or breeders] in [their] subclass would be unable to establish," *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974), that they do not sell "mill" animals, nor can the County "suggest a basis for the assumption that" other

[8] *See also United States v. Sampson*, 275 F. Supp. 2d 49, 89 n.19 (D. Mass. 2003); *accord Barletta v. Rilling*, 973 F. Supp. 2d 132, 138 (D. Conn. 2013) (statute "is both grossly over-inclusive and grossly under-inclusive as a proxy for serving the State's stated goals").

sources do not. *Id*. "[T]he potential for [sale of "mill" animals] is the same as to both", *Id*. at 637, or more accurately, there is actually a far greater potential for the sale of such animals from other sources than a regulated and accountable pet shop and breeders like the Plaintiffs here. A "blanket and conclusive exclusion" under the law is particularly suspect. *Id.* at 636. Here, the Ordinance from a practical standpoint works as a "blanket and conclusive exclusion" of (a) Pet Shops, (b) out of state breeders, and (c) all Class B license holders and it "would not serve the purposes of the [Ordinance] to conclusively deny them an opportunity to establish," *Id*., that they do not sell "mill" animals.

The Defendants' cases are all inapplicable because they do not involve a situation where one class is allowed to sell an item (such as a gun or an animal) and another is prohibited from doing so. *Greater Chicago Combine and Center, Inc. v. City of Chicago*, 431 F.3d 1065 (2005), involved a very different situation, where a distinction was being made between keeping pigeons in a residential area. *Kerr v. Kimmell*, 740 F. Supp. 1525 (D.C. Kan. 1990), involved a law that excluded greyhound breeds. *American Canine*, 2007 WL 4208358 (N.D. Cal. Nov. 27, 2007), involved a spay and neuter law.

V. Plaintiffs Have Stated Plausible Preemption Claims And A Violation of The Illinois Constitution.

A. The Ordinance Violates the Illinois Constitution. The Ordinance violates the Illinois Constitution because, as the Ordinance itself recognizes, its purpose relates to a statewide and nationwide problem. Section 6(a) of article VII of the 1970 Illinois Constitution provides in relevant part that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs". Ill. Const. 1970, art. VII, § 6(a). "An ordinance pertains to the government and affairs of a home rule unit where the ordinance relates to problems that are local in nature rather than State or national."

Village of Bolingbrook v. Citizens Utilities Co., 158 Ill.2d 133, 138 (1994). "Courts of our state have not hesitated . . . to strike down home rule ordinances where it is determined that the ordinances do not pertain to the government and affairs of a local unit." *Chicago Bar Ass'n v. Cook Cnty.,* 124 Ill. App. 3d 355, 360, *aff'd,* 102 Ill. 2d 438 (1984). The Illinois Constitution was violated for two reasons:

First, the Ordinance seeks to regulate the statewide and nationwide problem of animal mills and animal control. *County of Cook v. Village of Bridgeview*, 2014 IL App (1st) 122164 (2014) is illustrative. Cook County enacted an ordinance allowing feral cat colonies while Bridgeview prohibited them. The ordinances were enacted pursuant to the Animal Control Act which was designed in part to "control the stray animal population". *Id.* at 1277. As the Plaintiffs are doing here, Cook County sued for a declaration that Bridgeview's ordinance exceeded its home rule power. The Court found that "the problem of animal control [and] overpopulation is both a local and statewide concern [and therefore it must] weigh the relevant factors" listed in *Kalodimos v. Village of Morton Grove,* 103 Ill.2d 483 (1984), specifically, "the nature and extent of the problem; the unit of government having a more vital interest in resolving the problem; and the role traditionally played by local and statewide authorities in dealing with the problem." *Village of Bridgeview* at 1279. The County's Dr. Alexander, the administrator of the county's animal and rabies control department (also a defendant in this case), "testified that the feral cat problem was not only a statewide concern, but also a national concern." *Id.* As such, the Appellate Court found that animal control was an issue:

> "of statewide concern and [does] not strictly pertain to the government and affairs of Bridgeview as a home rule unit, within the meaning of article VII, section 6(a), of the 1970 Illinois Constitution. **[As such], Bridgeview's ordinance was an invalid exercise of its home rule authority.**" *Id.* at 1280 (emphasis added).

The Court also rejected Bridgeview's argument that Illinois law contained a savings clause that allowed its ordinance. *Id*.

Village of Bridgeview is applicable in this case. First, determining the constitutionality of the Ordinance is not an issue that should be decided on a motion to dismiss. *Village of Bridgeview* relied heavily (at the summary judgment stage) on Dr. Alexander's testimony that cats are "not only a statewide concern, but also a national concern". *Id*. at 1279. The *Kalodimos* factors are heavily fact intensive and the Plaintiffs are entitled to develop the record for trial in this case. [9]

Furthermore, breeders and pet shops are already regulated heavily at the federal and state level. Recently, Illinois passed the "Puppy Lemon Law," P.A. 98-593, 225 ILCS 605/3.15 mandating disclosures about dog and cat breeder sources such as their USDA licensing, requires warranties, and other disclosure.

Second, the Defendants have violated Article VII, § 7 of the Illinois Constitution because they have violated the federal constitution in the other claims alleged. *See Jucha v. City of N. Chicago*, 2014 WL 4696667, at *8 (N.D. Ill. Aug. 6, 2014) (the viability of an Article VII, § 7 of the Illinois Constitution claim "depends on the strength of . . . related constitutional arguments" and because the complaint contained viable constitutional claims, the claim under Article VII, § 7 of the Illinois Constitution stands).

Federal Preemption. The Defendants argue that the AWA's "savings clause", 7 U.S.C. § 2143(a)(8), immunizes the Ordinance from a preemption challenge (Motion, p.

[9] As explained above, *Illinois Rest. Ass'n.* was vacated. It also was decided before *Village of Bridgeview* and it is appropriate to defer to an Illinois state court in interpreting a matter of Illinois law. *Fagg v. Super Food Servs., Inc.,* 2007 WL 4570066, at *5 (E.D. Mich. Dec. 21, 2007) ("federalism requires a federal court to defer to the interpretation of state law by state courts.").

18). The Plaintiffs are mindful that AWA preemption challenges are typically unsuccessful as the police powers are broad when applied consistent with the AWA. *See e.g., DeHart v. Town of Austin*, 39 F.3d 718 (7th Cir. 1994) (ordinance prohibiting dangerous animals capable of inflicting death or physical harm appropriate; AWA does "not prohibit any [governmental entities] from promulgating standards in addition to those standards promulgated by the Secretary." *Id*. at 722).

The Ordinance at issue here goes much further than the police power cases previously adjudicated by the courts under the AWA. The Ordinance here was designed to stop the importation of animals in interstate commerce--which is directly contrary to the AWA's stated purpose, 7 USC § 2131, of "prevent[ing] and eliminat[ing] burdens upon [the free flow of] commerce." As explained above, the prohibition of regulated animal transporters (Class B licensees), the elimination of allowing license holders to have a nationwide benefit of their licenses, and taking away the ability of consumers to obtain animals from regulated sources is contrary to the AWA's regulations. Instead, the Ordinance will drive consumers to illegal sales off of the back of trucks in mall parking lots, onto unknown Internet sources, and other abhorrent practices.

VIII. The Ordinance Is Unconstitutionally Vague.

An ordinance is unconstitutionally vague if: (1) the ordinance "does not provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited," or (2) it "fails to provide explicit standards to prevent arbitrary and discriminatory enforcement by those enforcing the [ordinance]." *United States v. Lim,* 444 F.3d 910, 915 (7th Cir. 2006). The Ordinance is unconstitutionally vague because:

A. Applicability Clause: The Ordinance states:

> "This section shall apply to all areas within Cook County, Illinois, except those areas which are governed by an ordinance of another governmental entity (which by law may not be superseded by this section)."

This section is unclear what type of "ordinance" it is referring to, *i.e.*, an animal control ordinance, a pet leash ordinance, any ordinance? Arlington Heights is governed by a plumbing ordinance. Does this exempt Happiness is Pets of Arlington Heights from application? How should a person of ordinary intelligence know whether an unspecified Ordinance "may not be superseded"?

B. Lack of Definitions: The allowed animal sources are largely undefined; there is no definition of a humane society or most of the other allowed sources. A "humane society" is defined in part by Merriam Webster as "a society concerned with the promotion of humane conduct." Everyone can have a difference of opinion on "humane conduct" as is evidenced by the passionate positions in this case. Is the Amish community from whom Happiness sources a humane society? They are humane (they treat animals well) and they are a society (the Amish community).

C. Contradictory Punishment Section: Section 10-3 is internally inconsistent as it states that any person violating "any provision of this chapter [can be fined and imprisoned]." Two sentences later, it states that a violation of § 10-13 "shall be subject to a fine of $500 for each violation." On the one hand, the Ordinance removes the threat of incarceration (by making a separate rule for § 10-13 violations). On the other hand, imprisonment is allowed for violation of "any provision."

IX. A Plausible Impairment Of Contracts Claim Exists.

The Plaintiffs have stated a plausible claim that the Ordinance impairs their contracts. *See Six Kingdoms*, 2011 WL 65864 (injunction entered based on an impairment

of contracts theory arising out of a Petland franchisee's contractual obligations). The U.S. Const. art. I, § 10 provides that states may not "pass any . . . law impairing the Obligation of Contracts."[10] *Six Kingdoms* found it problematic that the pet shop would violate its contract if forced to comply with the applicable ordinance that required the disclosure of pricing. *Id*. at *3. As detailed in the Amended Complaint and above, the Plaintiffs will default under their contracts as a result of this law. As a result, they will not be able to honor their consumer warranties, they will not be able to comply with Illinois' mandated animals warranty, they will default on supply agreements, franchise agreements, and lease agreements (Comp. ¶¶ 63-65) and they will be driven into bankruptcy as a result of the whim of legislation that Cook County rushed through in a matter of days.

Conclusion

The state and federal constitutions exist, in large part, to protect honest and hardworking businesses from being destroyed by government. As such, the Defendants' request for dismissal must be denied.

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Respectfully Submitted,
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[10] "The Supreme Court has set forth a three-step procedure for analyzing federal constitutional claims that a state law impairs contractual obligations." *Six Kingdoms Enterprises,* 2011 WL 65864, at *4. "First, the threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id*. Next, courts "examine the state's asserted justification for the impairment, which must be a significant and legitimate public purpose." *Id.* at *5. Third, if the public purpose is adequate, courts then must consider "whether the challenged law was 'reasonably necessary' to achieve the purpose." *Id.*