IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX & MISCELLANEOUS REMEDIES SECTION

ILLINOIS RETAIL MERCHANTS ASSOCIATION; BERKOT, LTD. D/B/A BERKOT SUPER FOODS; FAIRPLAY, INC. D/B/A FAIRPLAY FOODS; CHIQUITA FOOD MARKET, INC. D/B/A FOOD MARKET LA CHIQUITA & TAQUERIA LEAMINGTON FOODS, INC.; TONY'S FINER FOODS ENTERPRISES, INC. D/B/A TONY'S FRESH MARKET; VALLI PRODUCE, INC.; AND WALT'S LAGESTEE, INC. D/B/A WALT'S FOOD CENTERS,

Plaintiffs,

v.

THE COOK COUNTY DEPARTMENT OF REVENUE; ZAHRA ALI, as Director of the Cook County Department of Revenue; and the COUNTY OF COOK,

Defendants.

17 L 50596

Hon. Daniel Kubasiak

FILED
2017 JUN 29 AM 9:41
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

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COOK COUNTY'S 2-615 MOTION TO DISMISS PLAINTIFFS' VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF AND FOR DECLARATORY JUDGMENT

Defendants the Cook County Department of Revenue, Zahra Ali, as Director of the Cook County Department of Revenue; and the County of Cook (hereafter collectively the "County"), by their attorney, KIMBERLY M. FOXX, State's Attorney of Cook County and her Assistant State's Attorneys, SISAVANH B. BAKER and JAMES S. BELIGRATIS, Assistant State's Attorneys, submit the following motion to dismiss Plaintiffs' Verified Complaint For Injunctive Relief And For Declaratory Judgment ("Complaint") brought pursuant to Section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615) state as follows:

BACKGROUND

On November 10, 2016 the County enacted the Sweetened Beverage Tax Ordinance, ("Ordinance") Section 74-850 *et seq.* of the Cook County Code of Ordinances. The Ordinance became effective on March 1, 2017 and requires the tax imposed thereby to be collected beginning July 1, 2017. The tax is imposed at the rate of $0.01 per ounce on the retail sale of all "sweetened beverages" in Cook County. *See* Section 74-852(a). The ultimate incidence of and liability for payment of the tax is imposed upon the purchaser of the sweetened beverage. Section 74-852(b).

On June 27, 2017 Plaintiffs filed their two-count Complaint in the instant action. Count I seeks a declaration that the Ordinance violates Article IX, Section 2 of the Illinois Constitution, commonly referred to as the Uniformity Clause, while Count II seeks a declaration that the Ordinance is unconstitutionally vague. Plaintiffs also filed an emergency motion for a temporary restraining order and preliminary injunction and a memorandum ("Memorandum") in support thereof.

ARGUMENT

A section 2-615 motion attacks the legal sufficiency of a complaint by alleging defects on its face. *Urbaitis v. Commonwealth Edison,* 143 Ill. 2d 458, 475 (1991). In ruling on a section 2-615 motion to dismiss, the Court must accept as true all well-pleaded facts in the complaint and all reasonable inferences which can be drawn therefrom. *McGrath v. Fahey,* 126 Ill. 2d 78, 90 (1988). In making this determination, the Court is to interpret the allegations of the complaint in the light most favorable to the plaintiff. *Id.* The question presented by a motion to dismiss a complaint for failure to state a cause of action is whether sufficient facts are contained in the pleadings which, if established, could entitle the plaintiff to relief. *Urbaitis,* 143 Ill. 2d at 475. A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of

facts can be proved under the pleadings which will entitle the plaintiff to recover. *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 86 (1996).

Under the Illinois Constitution, except as limited by article VII, section 6 of the constitution, a home rule unit such as the County "may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." Ill. Const. 1970, art. VII, § 6(a). The Illinois Supreme Court has consistently held that Article VII, §6(a) confers upon home rule units a broad taxing power, noting that "the framers of the 1970 Constitution considered the power to tax as essential to effective home rule and intended that power be broad." *Town of Cicero v. Fox Valley Trotting Club, Inc.*, 65 Ill. 2d 10, 17 (1976), *citing Mulligan v. Dunne*, 61 Ill. 2d 544, 548 (1975).

Of course, the General Assembly "may .... preempt the exercise of a unit of local government's home rule powers by expressly limiting that authority." *Palm v. 2800 Lake Shore Drive Condominium Association*, 2013 IL 110505, ¶ 31 (citing *Schillerstrom Homes, Inc. v. City of Naperville*, 198 Ill. 2d 281, 287 (2001)). Under article VII, section 6(h), "[t]he General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit *other than a taxing power*." Ill. Const. 1970, art. VII, § 6(h). (Emphasis supplied.) With respect to the power to tax, "[t]he General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax...." Ill. Const. 1970, art. VII, § 6(g).

I. The Ordinance pertains to the County's "government and affairs" under Article VII, Section 6(a) of the Constitution.

In *Palm v. 2800 Lake Shore Drive Condo Ass'n*, 2013 IL 110505, the Illinois Supreme Court set forth a test to determine whether a matter pertains to a home rule unit's government and affairs and is subject to legislation:

> (1) whether the subject pertains to local government and affairs under article VII, Section 6(a) or, instead, is the subject of a vital state policy, and then, if the subject pertains to local government, (2) whether the legislature expressly preempted the local exercise of power.

Palm, 2013 IL 110505 ¶ 36.

Applying *Palm*, the Ordinance pertains to the County's "government and affairs" for purposes of Section 6(a). For purposes of section 6(a), what must pertain to a home rule unit's "government and affairs" in a case involving a home rule tax is *the power to tax itself. See, e.g., Town of Cicero v. Fox Valley Trotting Club, Inc.*, 65 Ill. 2d 10, 19 (1976) (in which the Supreme Court agreed with the home rule unit's assertion that "the power to tax is a power which pertains to the government and affairs of Cicero.") *See also Mulligan v. Dunne*, 61 Ill. 2d 544, 548 (1975) (Cook County tax ordinance which did not conflict with any other constitutional provision held to "[concern] the government and affairs of no other taxing body or unit of government.") The County's taxing authority pertain to local government and the Legislature has not expressly preempted the exercise of taxing authority in the Ordinance. Thus, the Ordinance pertains to Cook County's "government and affairs" for purposes of section 6(a).

The Ordinance is structured similarly to the County's alcoholic beverage tax (Code Section 74-350 *et seq.*), the County's tobacco tax) (Code Section 74-430 *et seq.*); the County's Gasoline and Diesel Fuel Tax (Code Section 74-470 *et seq.*), the City of Chicago's cigarette tax (Mun. Code Section 3-42-010) and the City of Chicago's bottled water tax (Mun. Code Section 3-43-010 *et seq.*), all of which impose the tax upon the consumer and have survived several legal challenges. *See, e.g., Mulligan v. Dunne*, 61 Ill. 2d 544, 545 (1975) (rejecting challenge to Cook County's alcoholic beverage tax that tax violated Article VII, § 6 of the Illinois Constitution and the due process and equal protection clauses of the Illinois and United States constitutions); *Illinois Wine & Spirits Co. v. County of Cook*, 191 Ill. App. 3d 924, 925 (1st Dist. 1989)

(rejecting occupation tax, equal protection and extraterritoriality challenges to Cook County's alcoholic beverage tax); *S. Bloom, Inc. v. Korshak*, 52 Ill. 2d 56, 62 (1972) (rejecting occupation tax challenge to City of Chicago's cigarette tax ordinance); *American Beverage Association v. City of Chicago*, 404 Ill. App. 3d 682, 691 (1st Dist. 2010) (rejecting occupation tax and uniformity clause challenges); *Archer Daniels Midland Co. v. City of Chicago*, 294 Ill. App. 3d 186, 191-193 (1st Dist. 1997) (rejecting occupation tax and uniformity clause challenges to City of Chicago's gasoline tax); *see also Commercial National Bank v. Chicago*, 89 Ill. 2d 45, 58, 63 (1982) (noting that the delegates to the 1970 Illinois Constitutional Convention believed that home rule units could validly enact taxes upon gasoline, liquor and "*food*, drugs, etc.," provided that the tax involves a transfer of tangible personal property[1] and its legal incidence is actually on the consumer.) (Emphasis supplied.)

II. The tax imposed by the Ordinance is not preempted.

As noted above, the General Assembly "by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax...." Ill. Const. 1970, art. VII, § 6(g). No statute currently prohibits home rule counties from imposing a tax on sweetened beverages. Accordingly, the General Assembly has not preempted the County from enacting the tax.

III. The tax imposed by the Ordinance does not violate the Uniformity Clause.

Article IX § 2 of the Illinois Constitution, otherwise known as the Uniformity Clause, provides:

> In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be

1 Illinois courts have characterized food and beverages as "tangible personal property." *See, e.g.*, *American Beverage Association v. City of Chicago*, 404 Ill. App. 3d 682, 687 (2010); *Miller v. Department of Revenue*, 15 Ill. 2d 323, 325 (1958).

taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

Ill. Const. 1970, art. IX, §2.

Illinois courts have held that to survive scrutiny under the uniformity clause, a non-property tax classification, such as the one at issue in the case at bar, must satisfy pass a two-pronged test. First, the tax classification must be based on a "real and substantial difference" between the items taxed and those not taxed. Second, the classification must be reasonably related to the object of the legislation or to public policy. *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 153 (2003).

The first prong of the Uniformity Clause analysis requires the taxing body to "produce a justification for its classifications." ' [*Arangold*, 204 Ill. 2d] at 156 (quoting *Geja's Cafe v. Metropolitan Pier & Exposition Authority*, 153 Ill. 2d 239, 248 (1992)). This does not mean, however, that the taxing body has an evidentiary burden or is required to produce facts to justify the classification. *Arangold*, 204 Ill. 2d at 156; *Midwest Gaming & Entertainment, LLC v. County of Cook*, 2015 IL App (1st) 142786, ¶ 102. A minimum standard of reasonableness is all that is required. *See Allegro Services v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 253 (1996). The court's inquiry regarding the proffered justification is narrow, and '[i]f a set of facts "can be reasonably conceived that would sustain it, the classification must be upheld." ' *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62, 73 (2008) (citing *Geja's Cafe*, 153 Ill. 2d at 248).

Once the taxing body has offered a justification for the classification, the plaintiff then has the burden to persuade the court that the defendant's explanation is insufficient as a matter of law or unsupported by the facts. *Arangold*, 204 Ill. 2d at 156; *Sun Life Assurance Co. of Canada v. Manna*, 227 Ill. 2d 128, 136-37 (2007); *Midwest Gaming*, 2015 IL App (1st) 142786 at ¶ 102.

In the instant case, Plaintiffs contend that the Ordinance violates the Uniformity Clause (Complaint at ¶¶ 34-45) because it taxes "ready-to-drink, pre-made sweetened beverages," such as those that come in a bottle or from a chilled beverage dispensing machine but does not tax "on-demand, custom sweetened beverages" such as those mixed by a server or are hand-made. (Complaint at ¶ 36) Plaintiffs attack a subset of one of the seven exceptions to the definition of "Sweetened Beverage," namely number 3 which provides an exception to "beverages to which a purchase can add, or can request that a retailer add, caloric sweetener or non-caloric sweetener." See Section 74-851. Plaintiffs contend that the Ordinance's classifications of such taxed (*i.e.*, ready to drink) and untaxed (*i.e.*, hand-mixed and thus, *not* ready to drink) beverages are identical and are therefore not based on "real and substantial differences" and moreover, that the classifications bear no reasonable relationship to the purposes of the Ordinance -- which are to promote public health -- because the health consequences of these beverages are the same. (Complaint at ¶¶ 37, 38) In their Memorandum, Plaintiffs also note that the ready-to-drink and not-ready-to-drink sweetened beverages have the same amount of sugar, but are not both subject to the tax. (Pl. Mem. At pp. 5-6)

In fact, there *is* a real and substantial difference between the "pre-made sweetened beverage" from the "on-demand, custom sweetened beverage." A pre-made drink is uniform and consistent each time it is sold to the consumer. The on-demand, custom sweetened beverage by definition is not uniform, nor consistent but created to meet the requests of the consumer. Consider, for example, a Starbucks coffee drink, which is prepackaged in a container that can be bought at any grocery, convenience store, or other retailer. Despite Plaintiffs conclusory assertions, this product is simply not the same product that one can obtain when going to a Starbucks shop. The prepackaged item has been made at a different location, with different

ingredients and has been sitting in its container for a period of time. Further, there are numerous variations on what a customer can order.

Also, the exclusion of the custom ordered drink is reasonably related to the goal or policy of the Tax, which is the increase in revenue that will have an impact in reducing the consumption of sugary drinks. Compliance and remittance of the tax on ready-to-drink beverages requires no discernment by the collector that the tax is applicable. These items can be pre-programed by the retailer to collect the Tax at the point of sale. On the other hand, a custom ordered drink requires the collector or its agent to discern at the point of sale whether the tax applies. This is more difficult for the collector and will discourage compliance and ultimately reduce revenue. In addition, the enforcement of such collection by the County is more labor intensive would require additional resources, which would also contribute to reduced revenue. This administrative burden has been recognized as a "valid justification for assessing a tax in one instance but not another" for purposes of uniformity. *Container Corp. of Am. V. Wagner*, 293 Ill. App. 3d 1089, 1098 (1st Dist. 1997); citing *Communications & Cable of Chicago, Inc. v. City of Chicago*, 282 Ill. App. 3d 1038, 1049-50 (1st Dist. 1996); see also *North Sheffield v. City of Chicago*, 144 Ill. App. 3d 913, 921 (1st Dist. 1986), citing *Williams v. City of Chicago*, 66 Ill. 2d 423, 435 (1977) ("classifications may have been based on considerations of administrative convenience and expense of collection"). Thus, in this manner, the exception is reasonably related to the goal.

Plaintiffs have already identified another reason that ready-to-drink beverages are taxed while not-ready-to-drink beverages are not: The ready-to-drink beverage "is made in bulk because the retailer expects numerous orders of the [beverage]." *See* Pl. Mem. at pp. 5-6. As evidenced by the Ordinance's recitals, the County enacted the Ordinance to discourage the consumption of sweetened beverages because such beverages cause adverse health conditions. Given that purpose, it was reasonable for the County to consider that ready-to-drink sweetened

beverages are far more readily available for purchase and consumption than not-ready-to-drink beverages.

It is reasonable to expect that the sources from which ready-to-drink beverages may be purchased, such as supermarkets, convenience stores, drug stores and mass merchandisers, far outnumber the sources from which not-ready-to-drink beverages may be obtained. Thus, there is a "real and substantial difference" between these categories of drinks in that the former can reasonably be expected to be much more readily available for sale than the latter. The Ordinance's taxation of the more widely-available ready-to-drink beverage and not the relatively less available not-ready-to-drink beverage certainly is reasonably related to the purpose of the Ordinance -- which is to promote public health by discouraging the consumption of sugary drinks. The Ordinance does this by taxing the category of drink that is more likely to be purchased and hence, consumed.

It should be noted that the recitals to the Ordinance cite various studies relating to the ill effects of sugary drinks. One study has noted that just one subset of these drinks, *i.e.*, "ready-to-drink tea and coffee sales increased 21%." This study is available at: http://sugarydrinkfacts.org/resources/SugaryDrinkFACTS_Report_Results.pdf (at page 18 thereof).

In *American Beverage Ass'n v. City of Chicago*, 404 Ill. App. 3d 682, 687 (1st Dist. 2010) the Appellate Court rejected the plaintiff's contention that the City of Chicago's bottled water tax violated the Uniformity Clause. In so doing, the court noted that the City taxed one type of beverage (*i.e.*, bottled water) but did not tax any beverage marketed for certain specific features such as flavoring, vitamins, caffeine, or nutritional additives. The court noted that as a real and substantial difference existed between those items taxed and those not taxed, the bottled water tax satisfied the first prong of the Uniformity Clause. *American Beverage Ass'n*, 404 Ill. App. 3d

at 691. The court then noted that the City enacted the bottled water tax to raise revenue in a manner that discouraged consumers from buying noncarbonated bottled water, both to conserve energy from nonrenewable sources and to reduce the discharge of toxic contaminants and litter. The court then concluded that the classification was reasonably related to those purposes and therefore satisfied the second prong of the uniformity clause. *Id.* at 691.

In the instant situation, as in *American Beverage Ass'n*, the County proposes to tax one type of beverage, *i.e.*, "Sweetened Beverage[s]" as defined in the Ordinance, but does not tax other types of beverages marketed for specific features, specifically: "(1) beverages consisting of 100% natural fruit or vegetable juice; (2) beverages in which milk, or soy, rice, or similar milk substitute, makes up more than 50% of the beverage or is the first listed ingredient on the label of the beverage; (3) beverages to which a purchaser can add, or can request that a retailer add, caloric sweetener or non-caloric sweetener; (4) infant formula; (5) beverages for medical use; (6) any liquid sold as a therapeutic nutritional meal replacement or for use for weight reduction as a meal replacement; or (7) any syrup or powder that the purchaser himself or herself combines with other ingredients to create a beverage." As in *American Beverage Ass'n*, there is a real and substantial difference between the items taxed and not taxed, particularly as to category (3), above, and accordingly, the Ordinance satisfies the first prong of the Uniformity Clause. Further, the Ordinance's recitals make clear that the County is enacting the tax to raise revenue in a manner that discourages consumers from purchasing beverages that contribute to the development of serious health conditions. As was the case in *American Beverage Ass'n*, the Ordinance's classification is reasonably related to those purposes because it taxes the more readily available and thus, frequently purchased items (which bring in greater revenue) and therefore satisfies the second prong of the Uniformity Clause.

Plaintiffs cite *North Sheffield, Inc. v. Chicago*, 144 Ill. App. 3d 913 (1st Dist. 1986) and *Satellink of Chicago, Inc. v. Chicago*, 168 Ill. App. 3d 689 (1st Dist. 1988). These cases are inapposite because they offer "apples to oranges" comparisons. In *North Sheffield*, the court found that a City of Chicago ordinance that taxed alcohol that was intended to be consumed on the premises but did not tax alcohol that was intended to be consumed off the premises violated the Uniformity Clause because there was no difference between on-premise and off-premise alcohol – it was still alcohol. Unlike the Ordinance in the case at bar, the ordinance at issue in *North Sheffield* was apparently not enacted to discourage the consumption of alcohol or to address alcohol's deleterious effects upon those who consume it and was not attempted to be justified on those grounds. No justification by the City was offered that the on-premise alcohol was more readily available than the off-premise alcohol and therefore posed a greater health risk. Because the purpose of the ordinance in the case at bar differs from that in N*orth Sheffield*, *North Sheffield* does not afford a good a basis for comparison.

Similarly, in *Satellink*, the ordinance at issue involved an amendment to the City of Chicago's amusement tax ordinance to cover cable and subscription television but provided an exception for any entity with whom the city had entered into a franchise agreement. Again, the purpose of the ordinance amendment in *Satellink* differs considerably from that in the case at bar and so citation to *Satellink* is unhelpful as a basis for comparison. While *North Sheffield* and *Satellink* both involve taxation and non-taxation of arguably similar items, they do not involve, as the instant case does, a situation in which the purpose of the ordinance is to discourage the purchase of an item that causes ill health by focusing on the item that causes more harm (*i.e.*, the ready-to-drink beverage) because it is more readily available for purchase and consumption. As argued above, *American Beverage* is the more persuasive case.

IV. The Ordinance is not unconstitutionally vague.

Plaintiffs contend that the Ordinance is unconstitutionally vague because it is inconsistent with how sweetened beverages are served; many of Plaintiffs' point-of-sale systems are unable to correctly charge the tax in connection with the "SNAP" program; the tax fails to account for the requirements imposed upon retailers under the City of Chicago Alternative Pricing System Rules; the Ordinance is inconsistent with the Illinois Retailers Occupation Tax; retailers are subject to significant liabilities due to the vagueness of the Ordinance; and Defendants have provided insufficient guidance. Complaint at ¶¶ 62-74; Memorandum at pp. 6-13. Other than citations to *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill. 2d 389 (1987) and *People v. Boclair*, 202 Ill. 2d 89 (2002), neither of which involved a tax ordinance, Plaintiffs cite not a single case to support their contentions. As an aside, the legislative enactment in *Boclair* was held not to be unconstitutionally vague. Regardless, the Ordinance in the instant case is not unconstitutionally vague.

A vague ordinance is one that authorizes or encourages discriminatory enforcement. *See General Motors Corp. v. State Motor Vehicle Review Board*, 224 Ill. 2d 1, 24 (2007) (its meaning rests on whims of enforcers rather than on objective criteria). However, an ordinance is not vague if it provides people of ordinary intelligence with the opportunity to understand what conduct is prohibited and if it provides law enforcement and the judiciary with a reasonable standard to prevent arbitrary and discriminatory legal enforcement. See *In re Omar M.*, 2012 IL App (1st) 100866, ¶ 81; accord *Wilson v. County of Cook*, 2012 IL 112026, ¶ 21. Neither "'mathematical certainty' " nor " 'perfect clarity and precise guidance' " have ever been required in an ordinance in order for it to survive a vagueness challenge. *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 164 (1993) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)); *Omar*

M., 2012 IL App (1st) 100866, ¶ 81 (quoting *United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989))); accord *Wilson*, 2012 IL 112026, ¶ 22. Rather, whenever possible, each word or phrase of the ordinance is to be given its plain, ordinary and popularly understood meaning, and these are to be read in the context of the legislation as a whole. *See Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 26. An ordinance will not be deemed vague simply because someone may be able to "conjure up hypothetical situations in which the meaning of some terms may be in question." *Granite City*, 155 Ill. 2d at 164. Moreover, there is a "great[] tolerance for vagueness in civil" ordinances (*Omar M.*, 2012 IL App (1st) 100866, ¶ 81; *Wilson*, 2012 IL 112026, ¶ 23), and, in order for vagueness to be found, it must " 'permeate[] the text of' " the law (*Wilson*, 2012 IL 112026, ¶ 23 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999)). It does not even matter if the ordinance may be susceptible to misapplication or if its construction is somewhat doubtful. *See Granite City*, 155 Ill. 2d at 164-65. Ultimately, *as long as "the plain text of the ordinance sets forth clearly perceived boundaries, [the court's inquiry is ended."* *Wilson*, 2012 IL 112026, ¶ 24. (Emphasis supplied).

With the foregoing as a backdrop, it is clear that the Ordinance is not unconstitutionally vague.

1. The ordinance is not inconsistent with how sweetened beverages are served.

Citing no authority whatsoever, Plaintiffs contend that retailers cannot comply with the tax with any precision because, for example, the Ordinance prohibits the retailer from absorbing the tax, but the retailer must in fact absorb it in certain circumstances, such as breakage or staleness and retailers will not know how much ice to put into a cup because ice will affect the calculation of ounces. (Pl. Mem. At p. 9)

Plaintiffs' contentions are similar to those rejected by the Illinois Supreme Court in *Mulligan v. Dunne*, 61 Ill. 2d 544, 552 (1975) (court noted that refunds were available for instances involving "breakage, theft, *etc.*" through forms issued by the Department of Revenue.) The tax is based on how many ounces are sold. *See* Ordinance Section 74-852(a). The County has issued regulations (attached as Group Exhibit 1). Surely, that plain text of the Ordinance, supplemented by the regulations "sets forth clearly perceived boundaries." *Wilson*, 2012 IL 112026, ¶ 24.

2. The Ordinance is not inconsistent with SNAP.

The Ordinance specifically requires the collection of the tax "unless otherwise required by law." See Section 74-852. Since its enactment in November 2016, the County considered positions with respect to whether the tax would be imposed on SNAP purchasers. Ultimately, the County determined that the tax would not apply to SNAP purchases. See Regulation 2017-3, which is attached, along with Regulations 2017-1, 2017-2 and 2017-4 as Group Exhibit 1. The regulation further provides for a refund or credit on erroneously collected tax, including on those items paid for under SNAP. Thus, the Ordinance is not inconsistent with SNAP.

Furthermore, review of the SNAP citations establishes that SNAP regulations (See 7 U.S.C. § 2013(a); 7 C.F.R. § 272.1(b)(1),(2)) were designed to provide funding to the States who participate in the SNAP program. To the extent the a State, or local entity, such as Cook County is inappropriately collecting taxes on such purchases the remedy is to defunding the local entity, which is a separate issue from whether the Ordinance is vague.

3. The Ordinance is not inconsistent with the City of Chicago's alternative pricing rules.

Plaintiffs contend that the Ordinance fails to take into account for the requirements imposed on retailers under the City of Chicago's alternative pricing rules because the rules require that the "unit price" be calculated by "dividing the total selling price by total count,

measure or weight of the individual item" and this cannot be done because the Ordinance requires the tax to be included in the selling price. (Pl. Mem. at p. 3).

Regulation 2017-2, effective March 20, 2017 (amended June 13, 2017), addresses this problem by permitting distributors and retailers to *separately* list the base price and the tax on its shelf, advertisement, and menu. The regulation further provides for an additional six-month period of time (to January 1, 2018) for distributors and retailers to program their point of sale systems to comply with the display requirements permitted by the regulation:

> Understanding that distributors and/or retailers may need additional time to program their POS systems to allow for the tax to be reflected in the menu/advertised/shelf sale price, distributors and/or retailers will have an additional 6-month period, until January 1, 2018, to comply with the display requirements laid out in this regulation.

It must be noted that many of the Plaintiffs appear to be grocery stores. Presumably, these Plaintiffs' point of sale systems can account for taxes due under the County's Retailers' Occupation Tax Ordinance (Code Section 74-150 *et seq.*) and to the extent that they sell cigarettes and/or alcohol, the County's Alcoholic Beverage Tax Ordinance (Code Section 74-350 *et seq.*) and Tobacco Tax Ordinance (Code Section 74-430 *et seq.*). Any Plaintiffs that sell sweetened beverages in connection with the operation of a gas station can presumably account for the County's Gasoline and Diesel Fuel Tax (Code Sec. 74-470 et seq.) through their point of sale systems.

Thus, Plaintiffs' contentions in this regard lack merit.

4. The Ordinance is not inconsistent with the Illinois Retailers' Occupation Tax.

Plaintiffs contend that the Illinois Department of Revenue imposes the Retailers Occupation Tax upon the selling price of tangible personal property and prohibits taxes whose incidence is on the consumer from being incorporated into the selling price. However, Plaintiffs

contend, the Ordinance requires the tax to be included in the selling price, thus, contradicting IDOR requirements. (Pl. Mem. at p. 11)

As argued in 3, immediately above, Regulation 2017-2 addresses this concern by permitting the tax to be displayed separately, which will permit retailers to not include it in the "selling price" for Retailers Occupation Tax Purposes.

5. The fact that Plaintiffs may imagine the possibility of an adverse liability does not make the Ordinance void for vagueness.

With no citation to authority, Plaintiffs contend that they have a "legitimate concern regarding liability in *qui tam*, class actions and/or criminal law suits" for under and over-collection of the tax. (Pl. Mem. At p. 11) Plaintiffs also contend that "because a retailer's responsibilities are so unclear *under the Ordinance and related regulations*, Defendants are placing retailers, including Plaintiffs, in an untenable situation." (Pl. Mem. at p. 12) Plaintiffs cite a hypothetical example involving an unidentified statement of the Cook County Department of Revenue regarding the role played by ice cubes in determining the tax. (Pl. Mem. at p. 11)

The fact that Plaintiffs can "conjure up hypothetical situations" in which the meaning of some terms may be in question" does not make an ordinance void for vagueness. *See Granite City*, 155 Ill. 2d at 164. That is what Plaintiffs have done here. First, *qui tam* suits involve people with knowledge of an organization's activities who provide information about fraud, corruption or other illegal activity. The United States is the real party in interest in a *qui tam* suit. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). Plaintiffs do not say under what circumstances the Ordinance could result in their being reported for fraud, corruption or other illegal activity in a *qui tam* suit. This contention is pure speculation. Moreover, Plaintiffs do not say what parts of the "ordinance and related regulations" are unclear.

6. The regulations issued in connection with the Ordinance are intended to assist retailers in complying with the Ordinance's terms.

Without citation to authority, Plaintiffs insinuate that the ordinance is unconstitutionally vague because Regulations 2017-2, 3 and 4 have been recently amended and the monthly tax return was not available until after June 18, 2017 but is now available.

The purpose of these regulations is to further the purposes of the Ordinance, not make the Ordinance more confusing. Plaintiffs do not say how the recent amendments to the regulations make the Ordinance void for vagueness, nor do they say why the monthly tax return's recent *availability* poses a vagueness problem. Recall that neither "mathematical certainty" "nor "perfect clarity and precise guidance" have ever been required in an ordinance in order for it to survive a vagueness challenge. *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 164 (1993).

CONCLUSION

Wherefore, Defendants respectfully requests that this Honorable Court dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted,

KIMBERLY M. FOXX
State's Attorney of Cook County

/s/ James Beligratis
Sisavanh Baker (312) 603-7998
James S. Beligratis, (312) 603-4376
Assistant State's Attorneys
500 Richard J. Daley Center
Chicago, Illinois 60602
Attorney No. 10295
Sisavanh.baker@cookcountyil.gov
James.Beligratis@cookcountyil.gov