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

RHONDA EZELL, JOSEPH I. BROWN, WILLIAM HESPEN, ACTION TARGET, INC., SECOND AMENDMENT FOUNDATION, INC., and ILLINOIS STATE RIFLE ASSOCIATION,	)	
Plaintiffs,	)	
	)	Case No.: 10 CV 5135
v.	)	
CITY OF CHICAGO,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO STAY JUDGMENT

NOW COME the Plaintiffs, Rhonda Ezell, Joseph I. Brown, William Hespen, Action Target, Inc., Second Amendment Foundation, Inc., and Illinois State Rifle Association, by and through undersigned counsel, and, for their Response to Defendant's Motion to Stay the Court's Judgment of September 29, 2014, state the following:

INTRODUCTION

A stay pending appeal of the Court's September 29, 2014, Summary Judgment Opinion and Judgment (Dkt. ##280 and 281) is unwarranted and unnecessary. Moreover, a stay would be unduly prejudicial to Plaintiffs, as well as all other persons who are waiting for a firing range to open in the City of Chicago at which they can engage in their constitutional right to gain and keep firearms proficiency, and to those who are hoping to open such establishments. The Court reviewed the testimony of dozens of witnesses, hundreds if not thousands of pages of documentary evidence, and rendered a lengthy, comprehensive opinion. To be sure, Plaintiffs respectfully disagree with certain portions of the Court's ruling as well, but there are no grounds to stay the enforcement of the rulings that were in Plaintiffs' favor. Given the length of time

required for opening a range, it would be unfair to tell would-be range owners they cannot even start the range-approval process until the Seventh Circuit rules on the zoning and business hours issues.

ARGUMENT

"The issuance of a stay pending an appeal by a federal district court is governed by Rule 62 of the Federal Rules of Civil Procedure." *Harrell ex rel. NLRB v. Big Ridge, Inc.*, 2012 U.S. Dist. LEXIS 63475 at *3 (S.D.Ill. 2012).

> "The Court in its discretion should consider these four factors set forth by the Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987): (1) respondents' likelihood of success on appeal; (2) whether respondents will be irreparably harmed if a stay is not granted; (3) whether a stay would cause substantial injury to other parties interested in the proceedings, and (4) where the public interest lies. These factors are viewed on a sliding scale - if certain factors weigh more strongly in favor of a stay, then other factors need not be as strong. *Id*." *United States CFTC v. Worth Bullion Group, Inc.*, 2012 U.S. Dist. LEXIS 160689 at *2 (N.D.Ill. 2012).

"A stay pending appeal has been termed an extraordinary remedy." *Harrell*, 2012 U.S. Dist. LEXIS 63475 at *5 (citing *Kuri v. Edelman*, 491 F.2d 684, 687 (7th Cir. 1974); *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 686 (5th Cir. 1968)); *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973)).

Since the Seventh Circuit struck down the City's ban on firing ranges in 2011, zero commercial public ranges have opened in Chicago. The absence of ranges continues to frustrate the fundamental civil rights of self-defense, and training for self-defense purposes.

Defendant is not likely to succeed on appeal.

Zoning Restrictions

The Court correctly noted that Defendant improperly attempted to shift the burden of

proof to Plaintiffs (Dkt. #280 at p.13). Defendant's Motion has picked up right where its Summary Judgment Motion left off, improperly arguing Plaintiffs did not show the zoning restrictions imposed a burden. The Court rejected this, citing *Ezell*, 651 F.3d at 697 (in a facial challenge, individual application facts do not matter). Dkt. #280, p.13.

Nothing has changed. Besides the fact Chicago is still without a commercial public firing range (16 months post-Firearms Concealed Carry Act), the Court found the Plaintiffs are still the law-abiding persons discussed in *Ezell* (651 F.3d at 708) and *Moore* (702 F.3d at 940). The zoning ordinance has worked a total ban on firing ranges, to equal the actual ban struck down in 2011. The Court was correct to apply the same near-strict scrutiny employed in *Ezell*. And under that analysis, the relegation of firing ranges to manufacturing zones, where only 2.2% of land in the City could possibly be used for a range, was clearly unconstitutional, especially since it resulted in a ban on ranges virtually everywhere in the City except the farthest reaches of the West and South Sides (Dkt. #236-1). While the Defendant harps on the one person who thought he found an acceptable location, this does not prove a reasonable opportunity for the exercise of the right. *See, e.g.*, *North Avenue Novelties v. City of Chicago*, 88 F.3d 441. 445 (7th Cir, 1996). Dkt. 280, p.15.

Further, the Court noted that there was no proof of a connection between the City's claimed interest in restricting ranges to manufacturing zones (thieves and lead contamination) and the ordinance, that the restrictions would alleviate such claimed harms, or that these perceived harms would occur at all. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (municipality's evidence must fairly support its rationale for its ordinance). Despite the fact the Defendant continues to repeat the same speculative harms over and over, the City has not demonstrated a likelihood of reversal by the Seventh Circuit in its pending Motion.

Hours of Operation Restrictions

The Court properly ruled that there was no evidence by the Defendant of a fit between the restriction on the hours of operation of a range, and the supposed harms the restriction is meant to alleviate, namely traffic and police responses (Dkt. #280 at p.27). The City did not present any evidence these things would increase after 8:00PM, and indeed presented no evidence (except speculation) that these supposed harms would occur at all. This is why the restrictive hours of operation ordinance was struck down in *Annex Books, Inc. v. City of Indianapolis,* 624 F.3d 368, 369 (7th Cir. 2010), as cited by the Court.

Defendant will not be irreparably harmed if a stay is not granted.

Defendant continues to disingenuously tout the party line about crime and bystander injuries if someone opens a firing range, despite the fact that no one has testified that any such risk exists. It has been made clear that speculative harms will not suffice for the City to justify a restriction on Second Amendment rights (*See Ezell,* 651 F.3d at 709; *Moore v. Madigan,* 702 F.3d at 939-40). Nonetheless, despite an utter lack of evidence that any of this would occur (*See* Plaintiffs' Statement of Facts, Dkt. #231, at ¶¶ 62, 70, 72-73, 76. 78, 82), the Defendant continues to advance the "fear" argument. The Court should not find such speculation and fear-mongering any more convincing now than it did in September.

A stay would cause substantial injury to Plaintiffs and anyone attempting to open a range.

The individual Plaintiffs are still waiting for a place in the City where they can train with firearms for self-defense. Plaintiff Action Target and its would-be customers are still attempting to build such a range. It is axiomatic that the deprivation of constitutional rights is an irreparable injury. Through fits and spurts, local Second Amendment deprivations have been chipped away (*See, e.g., McDonald v. City of Chicago,* 130 S.Ct. 3010 (2010); *Ezell, Moore, Illinois*

Association of Firearm Retailers, et al. v. City of Chicago, Case No. 10-cv-4184 (N.D. Ill. Jan. 6, 2014)). A stay pending appeal will be a step in the wrong direction, as it will continue to deprive Plaintiffs of their constitutional rights to acquire and maintain proficiency in the use of firearms for self-defense (*See Ezell*, 651 F.3d at 704). Defendant offers no justification for such a deprivation save rearguing the same arguments (still without factual support) a second time.

The public interest lies in the protection of fundamental constitutional rights.

As a general proposition, the public interest lies in the protection of constitutional rights. "Surely, upholding constitutional rights serves the public interest." *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (citation omitted). At the same time, it is "obvious" that "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (citations omitted); *see also Freeman v. Lane*, 1990 U.S. Dist. LEXIS 1834 at *10 (N.D.Ill. 1990) ("The enforcement of constitutional rights is not a disservice to the public").

Further, in this case, the Defendant's own laws have stressed the importance of firearms proficiency and training. However, while stating this as a principle, the Defendant has done everything possible to prevent it from taking place within the City limits. The Defendant failed to show a link between the ordinances at issue in its Motion, and the alleged harms the ordinances were supposed to alleviate. It would not be in the public interest to allow the Defendant a stay notwithstanding the lack of a constitutional fit between ends and means, for that would be applying a rational basis test explicitly rejected in *District of Columbia v. Heller*, 554 U.S. 570, 628-29 and n.27 (2008). The Constitution requires more, and the Defendant has still failed to meet the standard.

CONCLUSION

For the above-stated reasons, the Defendant's F.R.Civ.P. 62 Motion for a stay of judgment pending appeal should be denied.

Dated: November 18, 2014

Respectfully submitted,

/s/ David G. Sigale
One of the Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record for the Plaintiffs, hereby certifies that on November 18, 2014, he served a copy of the above Response to Motion to Stay Proceedings, and this certificate of service, on:

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by electronic means pursuant to Electronic Case Filing (ECF).

/s/ David G. Sigale
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